

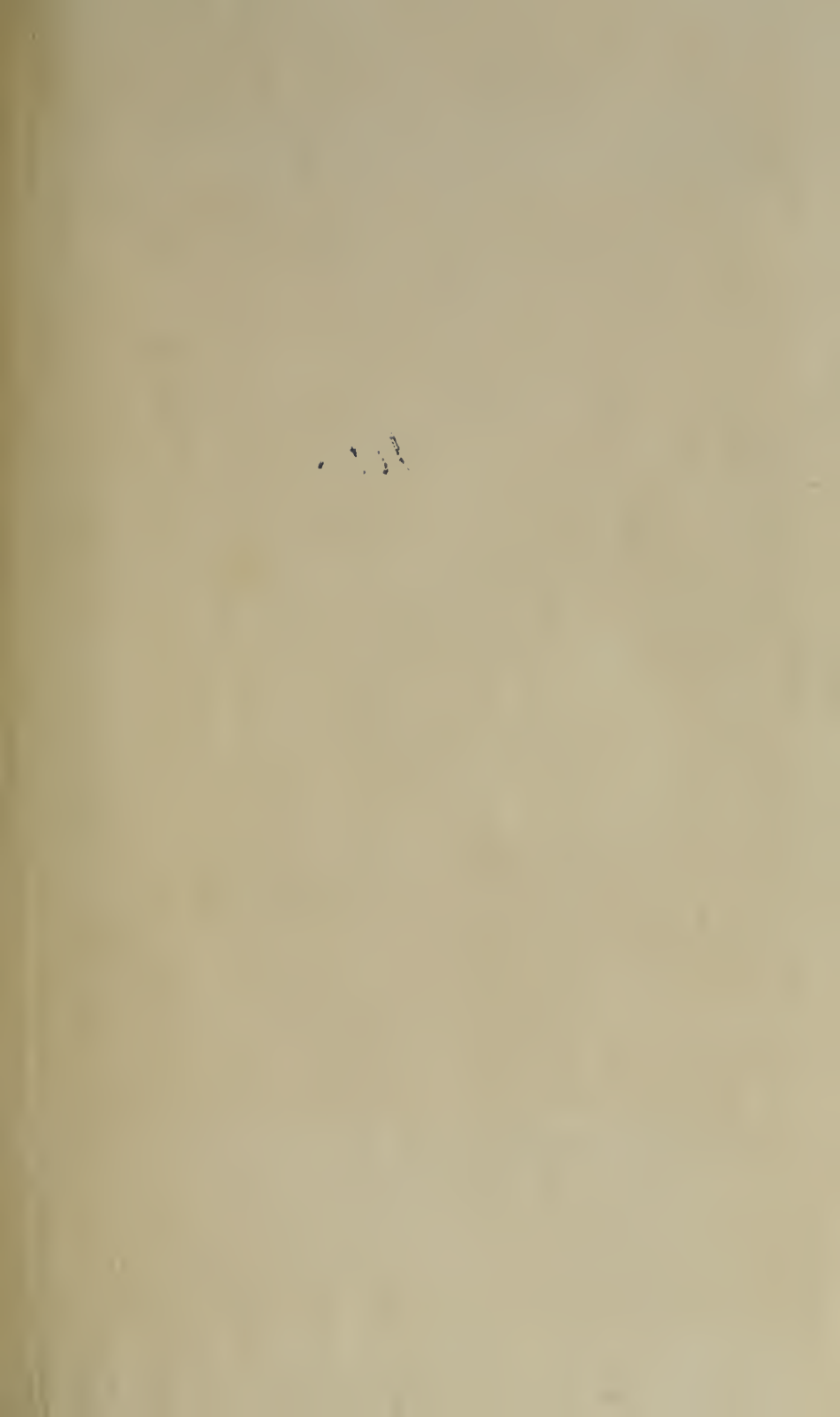
San Francisco Law Library

No. 118632

EXTRACT FROM BY-LAWS

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.



No. 10356

United States
Circuit Court of Appeals
For the Ninth Circuit.

GUARANTY TRUST COMPANY, a corporation, as liquidating
trustee of Yakima Holding Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

And

UNITED STATES OF AMERICA,

Appellant,

vs.

GUARANTY TRUST COMPANY, a corporation, as liquidating
trustee of Yakima Holding Corporation,

Appellee.

Transcript of Record
In Two Volumes
VOLUME I
Pages 1 to 255

Upon Appeals from the District Court of the United States
for the Eastern District of Washington
Southern Division

MAR 30 1943

United States
Circuit Court of Appeals
For the Ninth Circuit.

GUARANTY TRUST COMPANY, a corporation, as liquidating
trustee of Yakima Holding Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

And

UNITED STATES OF AMERICA,

Appellant,

vs.

GUARANTY TRUST COMPANY, a corporation, as liquidating
trustee of Yakima Holding Corporation,

Appellee.

Transcript of Record
In Two Volumes
VOLUME I
Pages 1 to 255

Upon Appeals from the District Court of the United States
for the Eastern District of Washington
Southern Division

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	Page
Answer	15
Appeal:	
Bond on (Guaranty Trust Co.)	500
Certificate of Clerk to Transcript of Record on	513
Designation of Record on—Guaranty Trust Co. (DC)	507
Designation of Record on—Guaranty Trust Co. (CCA)	516
Designation of Additional Portions of Record on—United States of America (DC)	508
Notice of (Guaranty Trust Co.)	499
Notice of (United States of America)	505
Order Extending Time for Docketing and Filing Record on	512
Statement of Points on:	
Guaranty Trust Co. (DC)	502
Guaranty Trust Co. (CCA)	515
United States of America (DC)	505
United States of America (CCA)	518

Index	Page
Bond on Appeal—Guaranty Trust Company...	500
Certificate of Clerk to Transcript of Record on Appeal	513
Complaint	3
Designation of Record on Appeal—Guaranty Trust Company (DC)	507
Affidavit of Mailing	503
Designation of Record on Appeal—Guaranty Trust Company (CCA)	516
Designation of Additional Portions of Record on Appeal—United States of America (DC)	508
Affidavit of Mailing	506
Supplemental	510
Affidavit of Mailing	511
Findings of Fact and Conclusions of Law.....	480
Judgment	498
Names and Addresses of Attorneys	1
Notices of Appeal:	
Guaranty Trust Company	499
United States of America	505
Opinion of the Court	465
Opinion of the Court on Facts (Detailed).....	445
Order Allowing Transcript of Testimony to be made Supplemental Record	509

Index

Page

Order Extending Time for Docketing and Filing Record on Appeal	512
Order for Pre Trial under Rule 16	19
Pre Trial Order	20
Statement of Facts	21

Exhibits for Defendant:

A—Receipt of Drumheller, Ehrlichman & White	212
Set out at page	440
B—Receipt of Yakima First National Bank	212
Set out at page	441
C—Stock Investment Account, Yakima Holding Corp. Ledger	151
Set out at page	442
D—Page 21, Cash Disbursement Journal	154
Set out at page	443

Exhibits for Plaintiff:

1—George H. Bradshaw Account..	25
Set out at page	256
2—Pages 2, 3, 4 and 5, Alex Miller Account	26
Set out at page	257

Index

Page

Exhibits for Plaintiff (Continued):

3—Pages 1, 2, 3 and 4, Edward M. Pocock Account	27
Set out at page.....	261
4—Yakima First National Bank Ac- count	28
Set out at page	265
5—Cancelled Stock Certificate Wn. 69	29
Set out at page.....	267
6—Cancelled Stock Certificate 424...	30
Set out at page	270
7—Cancelled Stock Certificate Wn. 226	30
Set out at page	272
8—Cancelled Stock Certificate W 259	30
Set out at page	276
9—Cancelled Stock Certificate Wn. 334	30
Set out at page	280
10—Cash Disbursement Journal, page 19, Yakima Holding Company....	32
Set out at page	284

Index

Page

Exhibits for Plaintiff (Continued):

11—Cash Receipt Journal, Yakima Holding Corp., Page 39.....	33
Set out at page	285
12—Sunshine Mining Company Ledger Account — Yakima Holding Corporation	34
Set out at page	287
13—Checks #347 and 348 to Yakima First National Bank — Yakima Holding Corp.	36
Set out at page	288
14—Checks #349 and 350 to Yakima First National Bank — Yakima Holding Corp.	36
Set out at page	288
15—Minutes of April 12, 1935, Yakima Holding Corporation	44, 49
Set out at page	289
16—Copy of Letter, Bradshaw to Miller, 12/11/34	43, 45
Set out at page	312
17—Copy of Letter, Miller to Bradshaw, 12/11/34	43, 45
Set out at page	313

	Index	Page
Exhibits for Plaintiff (Continued):		
18—Copy of Letter, Alex Miller to Guaranty Trust Co., 12/11/34		46
Set out at page		314
19—Letter, Bradshaw to Yakima First National Bank, 12/12/34		52
Set out at page		315
20—Cashier's Checks (2) Y.F.N.B. to Yakima Holding Co., 4/30/35		53
Set out at page		317
21—Checks (2), Yakima First Na- tional Bank to Yakima Holding Corp. and to Self, 5/1/35 and 4/30/35		53
Set out at page		318
22—Credit Memo and Deposit Slip, Yakima Holding Corp.		55
Set out at page		319
23—Credit Memo—Undivided Profits Account Y.F.N.B., 5/2/35		56
Set out at page		320
24—Receipt for Sale of Sunshine Stock by Liquidating Agent, Yakima First National Bank		58
Set out at page		320

Index

Page

Exhibits for Plaintiff (Continued):

25—Undivided Profits Account, Yakima First National Bank.....	57
Set out at page	322
26—Income Tax Return, 1935, Y.F. N.B.	58
Set out at page	327
28—Income Tax Return, 1935, Yakima Holding Corporation	60
Set out at page	367
29—Ledger Sheets of Drumheller, Ehrlichman & White, Account of Y.F.N.B.	66
Set out at page	394
30—Receipt for S. S. Mining Co. Stock from Y.F.N.B.	66
Set out at page	413
32—Invoice of Sales for Y.F.N.B. by Drumheller, et al	81
Set out at page	417
33—Notes Payable, Account of Yakima Holding Corp. Ledger	97
Set out at page	436

Index	Page
Witnesses for Defendant:	
Bradshaw, William	
—direct	184
—cross	192
Cooke, Anthony J.	
—direct	214
—cross	239
—recross	251
Glaetzner, F. V.	
—direct	208
—cross	213
—redirect	213
Witnesses for Plaintiff:	
Crawford, H. F.	
—direct	81
—cross	83
—redirect	88
—recross	89
Funk, W. J.	
—direct	30
—cross	60
Hardy, Robert M.	
—direct	91
—cross	108
—redirect	142
—recross	149
—recalled, direct	182
—cross	183
—rebuttal, direct	252
—cross	253

Index

Page

Witnesses for Plaintiff (Continued):

Hull, Carroll	
—direct	24
Nimmons, Howard	
—direct	61
—cross	69
—redirect	77
Rightmire, L. R.	
—direct	154
—cross	167
—redirect	182

Statement of Points on Appeal:

Guaranty Trust Co. (DC)	502
Affidavit of Service	503
Guaranty Trust Co. (CCA)	515
United States of America (DC)	505
Affidavit of Service	506
United States of America (CCA)	518

Summons	2
---------------	---

Supplemental Designation of Additional Portions of Record, United States of America (DC)	510
Affidavit of Service	511

NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

CHENEY & HUTCHESON,

426 Miller Building, Yakima, Washington,

Attorneys for Appellant

EDWARD H. CONNELLY,

United States Attorney,

HARVEY ERICKSON,

Assistant United States Attorney,

332 Post Office Bldg., Spokane, Washington

Attorneys for Cross-Appellant

District Court of the United States for the Eastern
District of Washington, Southern Division

No. 68

GUARANTY TRUST COMPANY, a corporation,
as liquidating trustee of YAKIMA HOLDING
CORPORATION, a corporation,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

SUMMONS

To the above named Defendant:

You are hereby summoned and required to serve upon Cheney & Hutcheson, plaintiff's attorney, whose address is No. 426 Miller Building, Yakima, Yakima County, Washington, an answer to the complaint which is herewith served upon you, within sixty days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Dated this April 21, 1941.

[Seal]

A. A. LaFRAMBOISE,

Clerk of Court

By THOMAS GRANGER

Deputy Clerk

RETURN OF SERVICE OF WRIT

I hereby certify and return, that on the 22nd day of April 1941, I received the within summons and complaint, and on the 22nd day of April, 1941 at Spokane, Washington, I served Lyle D. Keith, U. S. Attorney for the Eastern District of Washington personally.

WAYNE BEZONA,

United States Marshal

By ELWYN L. DANIEL,

Deputy United States Marshal

Fees \$2.00

[Endorsed]: Filed Apr. 25, 1941. [1*]

[Title of District Court and Cause.]

COMPLAINT

Comes now the plaintiff above named and for cause of action against the above named defendant complains and alleges as follows:

1.

The action arises under the laws and statutes of the United States and particularly under the Tucker Act of March 3, 1887, Chapter 359, 24 Stat. 505, as amended, U. S. C. A. Title 28, Section 41, subdivision 20; also under the Internal Revenue

*Page numbering appearing at foot of page of original certified Transcript of Record.

Code of the United States as amended, as hereinafter more fully appears.

2.

That at all times herein mentioned the plaintiff herein, Guaranty Trust Company, was and now is a corporation duly organized and existing under and by virtue of the laws of the state of Washington, and engaged in transacting and duly authorized and qualified to transact a trust company business, and that its principal place of business is situated in the city of Yakima, Yakima County, Washington, and within the judicial district hereinabove stated, and that it has paid all license fees due to said state of Washington. [2]

3.

That at all times from 1930 until 1937 said Yakima Holding Corporation was a corporation duly organized and existing under and by virtue of the laws of the state of Washington, and having its principal place of business at Yakima, Yakima County, Washington, in said judicial district hereinabove stated. That said Yakima Holding Corporation was duly disincorporated and dissolved during the year 1937 pursuant to the laws and statutes of the state of Washington. That prior to said dissolution and on or about the 10th day of November, 1936, all of the assets, funds and property of every kind and character whatsoever of said Yakima Holding Corporation were duly transferred, assigned and conveyed to the plaintiff, Guaranty Trust Company, as liquidating trustee,

and at all times thereafter said Guaranty Trust Company has been and now is the duly appointed, qualified and acting liquidating trustee of said Yakima Holding Corporation.

4.

That during the year 1935 and for a number of years both prior and subsequent thereto Yakima First National Bank was a duly organized and existing national banking association engaged in transacting business at Yakima, Yakima County, Washington, as a national bank. During the years 1934 and 1935 said Yakima Holding Corporation was a holding corporation owning practically all of the stock of said Yakima First National Bank, practically all of the stock of the First National Bank of Wapato, a national banking association located at Wapato, Yakima County, Washington, and the majority of the stock of said Guaranty Trust Company.

5.

In the late summer and early fall of 1934 a number of the officers of said Yakima First National Bank were stockholders in [3] Sunshine Mining Company, a successful mining corporation, and were familiar with its properties and its prospects, and believed that the market value of the stock of said Sunshine Mining Company would substantially increase in value. Accordingly at the request of said Yakima First National Bank the Yakima Hold-

ing Corporation purchased for said bank on the open market 7500 shares of stock of Sunshine Mining Company, and paid therefor the total sum of \$59,576.50. Said stock was purchased by said Yakima Holding Corporation for said Yakima First National Bank because of certain limitations on the legal powers of national banking associations. None of said stock was issued out in the name of either Yakima First National Bank or Yakima Holding Corporation; but 2500 shares thereof was issued in the name of George H. Bradhsaw, who was then the secretary of said Yakima Holding Corporation, and 5000 shares were not transferred on the books of the Sunshine Mining Company, but remained on said books in the name of the previous owner and seller of said stock, Alexander Miller.

6.

Thereafter, and on or about December 12, 1934, Alexander Miller, for the purpose of aiding and assisting said Yakima First National Bank, sold and delivered 5000 shares of stock of the Sunshine Mining Company on the basis of \$12.00 per share to said Yakima Holding Corporation for said bank in exchange for 4000 shares of stock of Yakima Holding Corporation, transferred by it to him on the agreed basis of \$15.00 per share. Said 5000 shares of stock of the Sunshine Mining Company likewise remained on the books of said mining company in the name of Alexander Miller. [4]

7.

With reference to all of said 12,500 shares of stock of Sunshine Mining Company, it was at all times definitely, orally agreed between said Yakima First National Bank and said Yakima Holding Corporation that said Yakima Holding Corporation was to hold said stock for and on behalf of the said bank, and that said bank was to be at all times the sole beneficial owner and holder thereof; that at the time of the sale of said stock said bank was to pay said holding corporation the actual cost of said stock; and that if any loss resulted from the purchase and sale of said stock the said loss would be borne entirely and exclusively by the said bank, and it would reimburse said holding corporation therefor; and that if any profit resulted from the purchase and sale of said stock the entire profit therefrom would inure and accrue to and for the said bank and said profits would be the property of the said bank entirely and exclusively. None of said stock was ever at any time held in the name of either said Yakima First National Bank or said Yakima Holding Corporation. Until the sale thereof the title thereto was at all times held by said Yakima Holding Corporation in trust for said Yakima First National Bank.

8.

On or about December 12, 1934, said oral agreement was confirmed by a letter written by said Yakima Holding Corporation through its secretary,

George H. Bradshaw, to said Yakima First National Bank, reading as follows, to-wit: [5]

“YAKIMA HOLDING CORPORATION

Yakima, Washington

December 12, 1934

Yakima First National Bank

Yakima, Washington

Gentlemen:

In order to confirm an understanding we have had with the bank regarding the purchase of 7500 shares of Sunshine Mining Company stock, I thought it advisable to write this letter. It was understood that this stock was to be purchased by the Yakima Holding Corporation and held by it for the account of the bank. The Yakima Holding Corporation was to be reimbursed for the amount actually paid for the stock, plus a small appreciation to be determined at the end of the year if this should be deemed necessary. We, therefore, treated this stock as being held for the bank, and if any loss results it is to be the loss of the bank and, of course, if any profit results it will likewise accrue to the bank.

I am taking this opportunity also of setting out the understanding reached in connection with the proposal submitted by us to Mr. Alexander Miller to exchange 4000 shares of stock of the Yakima Holding Corporation for 5000

shares of stock of the Sunshine Mining Company. We are doing this on the express understanding that stock of the Sunshine Mining Company will be taken over by the bank at the stipulated price of \$12.00 per share. This understanding is to apply to any further similar transactions.

I would ask you to signify that this is also in accordance with your understanding of these transactions by signing the acknowledgment on the bottom of this letter.

Your very truly,

GEO. H. BRADSHAW

Secretary."

On the same date a copy of the said letter was returned by the said bank to said holding corporation with the following statement signed by the cashier of said bank, H. F. Crawford, inscribed thereon:

"The above represents the understanding that has been reached between the bank and the Yakima Holding Corporation with respect to the matters set out above and the same is hereby approved.

YAKIMA FIRST NATIONAL
BANK

By H. F. CRAWFORD

Cashier." [6]

9.

That on or about the 29th day of April, 1935, the market price of the stock of Sunshine Mining Com-

pany had greatly advanced, and on or about said date the said bank ordered sold 11,000 shares of said stock, and the same was sold by said holding corporation for said bank for a selling price of \$199,-225.45. The total purchase price of said 11,000 shares of said stock was \$101,576.50. The amount of the selling price of said stock was paid to the Yakima First National Bank, and said bank paid to said Yakima Holding Corporation the sum of \$121,451.50, by passing a credit to said holding corporation, and thereby reimbursed said holding corporation for the cost and purchase price of said entire 12,500 shares of said stock. Thereupon the remaining 1500 shares of said stock were transferred to said Yakima First National Bank. The profit in the said transaction was reported by said Bank in its income tax return for the year 1935, and thereafter said Yakima Holding Corporation had no further connection whatsoever therewith. Said Yakima Holding Corporation never received any of the profits or proceeds of sale of any of said stock, and all of the profit therefrom accrued to and was received by the said bank, except that said Yakima Holding Corporation received a small appreciation write-up in the sum of \$1875.00 as compensation for its services in handling said transaction, the same being a write-up of the value of 7500 shares at 25c per share. Said income hereinabove last referred to was duly reported in the income tax return of said Yakima Holding Corporation for the year 1935.

10.

Thereafter, in 1937, the United States Commissioner of Internal Revenue assessed a deficiency against the plaintiff [7] herein for income tax for the year 1935 in the sum of \$13,037.55, together with a 50% penalty thereon under Section 293(b) of the Revenue Act of 1934, in the sum of \$6,518.78, and a deficiency in excess profits tax against the plaintiff for the year 1935 in the sum of \$3,477.96, and a 50% penalty thereon under said section of said statute in the sum of \$1,738.98, or total additional tax in the sum of \$16,515.51, plus 50% penalty thereon in the sum of \$8,277.76, or the total sum of \$24,773.27.

11.

Thereafter, in May, 1937, plaintiff duly mailed and filed with the Commissioner of Internal Revenue, as provided by law, a written, sworn protest as to said deficiency tax assessments and penalties, and sworn affidavits in support of said protest. Thereafter said protest was overruled and denied by said Commissioner of Internal Revenue, and said alleged tax deficiency assessments and penalties as aforesaid were ordered paid.

12.

That thereafter, and on or about the 27th day of May, 1938, the plaintiff paid to the defendant the said sum of \$24,773.27 plus interest thereon in the sum of \$2160.59 to said date, or a total payment of \$26,933.86, in payment of said alleged deficiency tax

assessments and penalties hereinabove referred to, as required by said Commissioner of Internal Revenue of the defendant.

13.

Thereafter, and on or about the 1st day of March, 1940, the plaintiff duly filed with the defendant written, sworn claims for refund of said alleged additional taxes and penalties assessed against the plaintiff as aforesaid. Plaintiff filed a claim for refund for said income tax and excess profits tax [8] paid as aforesaid, and plaintiff filed a separate claim for refund of said penalties paid by it as aforesaid.

14.

On or about the 4th day of October, 1940, the defendant by its Commissioner of Internal Revenue disallowed and denied said claims for refund.

15.

That said alleged deficiencies in said taxes were assessed against the plaintiff by the defendant through its Commissioner of Internal Revenue upon a claim of the defendant that the plaintiff was the actual beneficial owner and holder of said 11,000 shares of stock purchased and sold as hereinabove stated. That in truth and in fact the plaintiff herein was never the true, actual, or beneficial owner of any of said stock, but at all times prior to the sale thereof merely held said stock in trust for said Yakima First National Bank, and that during

all of said time the true, actual, and beneficial owner of said stock was said Yakima First National Bank.

16.

That said 50% penalties were assessed against the plaintiff by the defendant through its said Commissioner of Internal Revenue upon the claim that plaintiff was guilty of fraud in failing to report the profit on the purchase and sale of said stock as income and profit accruing to the plaintiff herein. That in truth and in fact no profit whatever accrued to the plaintiff herein through the purchase and sale of said stock, and the plaintiff was never guilty of any fraud or bad faith whatever in connection with any of said transactions. At all of said times the books and records of Yakima Holding Corporation were kept by said Guaranty Trust Company and those in charge of keep- [9] ing said books and records at all times understood and believed in good faith that Yakima Holding Corporation was not at any time the beneficial owner of said 12,500 shares of Sunshine Mining Company stock or any part thereof. That the officers and agents of said Guaranty Trust Company who prepared and executed the 1935 income tax return of said Yakima Holding Corporation at all times believed in good faith that the said income tax return was truly, properly and correctly prepared, and that no officer or representative of said Yakima Holding Corporation or said Guaranty Trust Company was at any time aware of the fact that the correctness of said income tax return could even be questioned in any manner.

17.

That the plaintiff herein realized no profit whatsoever on the sale of said 11,000 shares of Sunshine Mining Company stock in 1935. In the year 1935 the plaintiff herein had no taxable profit or net income whatsoever. The Yakima First National Bank received all of the profit realized on the sale of said stock.

18.

That the Collector of Internal Revenue of the defendant, by whom said income and excess profits taxes and penalties were collected from the plaintiff as aforesaid, is not now in office as Collector of Internal Revenue at the time of the commencement of this suit. That the present United States Collector of Internal Revenue for the state of Washington took office as such only a few months prior to the commencement of this action. [10]

19.

That by reason of the premises the said Internal Revenue taxes, income tax, and excess profits tax and penalties hereinabove referred to were erroneously and illegally assessed against the plaintiff herein, and the same were erroneously and illegally collected from the plaintiff herein, and the said taxes and penalties were collected from the plaintiff herein without lawful authority. That said taxes and penalties assessed against and collected from the plaintiff herein as aforesaid were excessive, and the same were wrongfully collected under

the Internal Revenue laws. That by reason of the premises the defendant is now lawfully indebted to the plaintiff herein in the said sum of \$26,933.86, together with interest thereon at the legal rate of 6% per annum from May 27, 1938, until paid. That no part thereof has been paid by the defendant to the plaintiff.

Wherefore, plaintiff prays that it may have and recover judgment against the defendant herein in the said sum of \$26,933.86, together with interest thereon at the lawful rate of 6% per annum from May 27, 1938, until paid, together with its costs and disbursements herein; and plaintiff prays for such other and further relief as may be just and proper in the premises.

CHENEY & HUTCHESON
ELWOOD HUTCHESON

Attorneys for Plaintiff
426 Miller Building
Yakima, Washington. [11]

(Duly Verified).

[Endorsed]: Filed Apr. 21, 1941. [12]

[Title of District Court and Cause.]

ANSWER

Now comes the United States, a corporation sovereign and body politic, by its attorney, Lyle Keith, United States Attorney for the Eastern District of Washington, and in answer to the allegations in the

bill of complaint admits, denies, and otherwise answers such allegations as follows:

I.

Does not deny the allegations in Paragraph 1.

II.

Does not deny the allegations in Paragraph 2.

III.

Does not deny the allegations in Paragraph 3.

IV.

Does not deny the allegations in Paragraph 4.

V.

Specifically denies each and every allegation in Paragraph 5 of the complaint and on the contrary specifically avers that plaintiff made the purchases but on its own behalf and for its benefit and did not make such purchases of the stock as alleged for the Yakima National Bank. [13]

VI.

Specifically denies each and every allegation in Paragraph 6 of the bill of complaint.

VII.

Specifically denies each and every allegation contained in Paragraph 7 of the bill of complaint.

VIII.

As to the allegations in Paragraph 8 of the bill

of complaint, defendant demands strict proof that the letter alleged to have been written by plaintiff's officer to the Yakima National Bank was written on the date alleged, to wit, December 12, 1934.

IX.

As to the allegations in Paragraph 9 of the bill of complaint, defendant denies that the stock referred to was sold for the sole benefit of the Yakima National Bank as alleged, but specifically avers that this stock was sold by plaintiff for its own exclusive benefit.

X.

Admits the allegations in Paragraph 10 of the bill of complaint.

XI.

Admits the allegations in Paragraph 11 of the bill of complaint.

XII.

Admits the allegations in Paragraph 12 of the bill of complaint.

XIII.

Admits the allegations in Paragraph 13 of the bill of complaint.

XIV.

Admits the allegations in Paragraph 14 of the bill of complaint.

XV.

As to the allegations in Paragraph 15 of the bill of complaint, defendant admits that the taxes were assessed against the plaintiff by the Commissioner

of Internal Revenue on the ground that the plaintiff was the actual beneficial owner and holder of said 11,000 shares of stock purchased and sold as heretofore alleged [14] in the bill of complaint, but defendant denies all other allegations in Paragraph 15.

XVI.

Admits that the 50% penalties were assessed against the plaintiff as alleged, on the ground that the plaintiff was guilty of fraud in failing to report the profit on the purchase and sale of said stock. Specifically denies each and every other allegation in Paragraph 16.

XVII.

Specifically denies each and every allegation in Paragraph 17 of the bill of complaint.

XVIII.

Admits the allegations in Paragraph 18 of the bill of complaint.

XIX.

Specifically denies each and every allegation in Paragraph 19 of the bill of complaint.

Wherefore, defendant prays that plaintiff take nothing from it in this suit; that the bill of complaint be dismissed and all costs expended herein assessed against plaintiff.

LYLE KEITH

United States Attorney.

[Endorsed]: Filed Aug. 19, 1941. [15]

[Title of District Court and Cause.]

PRE-TRIAL ORDER UNDER RULE 16

To Cheney & Hutcheson, Attorneys for Plaintiff:

To Lyle Keith, Attorney for Defendant:

By virtue of the Pre-Trial Rule 16 of the Rules of Civil Procedure for the District Courts of the United States, you are hereby directed to appear before the undersigned Judge of the above entitled Court on Tuesday, October 7, 1941, at five o'clock P. M., in the Judge's Chambers, in the Post Office Building at Yakima, Washington, to consider:

- (1) The simplification of the issues
- (2) The necessity or desirability of amendments to the pleadings
- (3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof
- (4) The limitation of expert witnesses
- (5) Such other matters as may be of aid in the disposition of the action.

The Clerk of this Court is directed to forthwith serve this order upon the above named parties by mailing a copy thereof to their attorneys at the address disclosed by the record herein.

Dated this 29 day of September, 1941.

L. B. SCHWELLENBACH

United States District Judge

[Endorsed]: Filed Sep. 29, 1941. [16]

[Title of District Court and Cause.]

PRE-TRIAL ORDER

This cause duly came on for pre-trial hearing on this day before the undersigned Judge of the above entitled Court pursuant to Rule 16 of Rules of Civil Procedure for the District Court of the United States; Cheney & Hutcheson appearing as attorneys for plaintiff and Lyle Keith appearing as attorney for defendant; and the Court having examined the pleadings and having considered same and having heard the statements for both parties herein;

Now Therefore, the Court does hereby find as follows:

That the only factual question remaining at issue under the pleadings herein is whether under the circumstances of this case the profit realized from the sale of 11,000 share of stock in Sunshine Mining Company was taxable to the Yakima Holding Corporation or to its subsidiary (in which it owned practically all of the capital stock) Yakima First National Bank; and further that if the said profit is taxable to the Yakima Holding Corporation, whether the Yakima Holding Corporation in making its 1935 income tax return in not reporting said profit was guilty of fraud.

Done in open court this 4th day of December, 1941.

L. B. SCHWELLENBACH
District Judge

Approved:

CHENEY & HUTCHESON

Attorneys for Plaintiff

O. K. as to form

LYLE KEITH

Attorney for Defendant

[Endorsed]: Filed Dec. 4, 1941. [17]

[Title of District Court and Cause.]

STATEMENT OF FACTS

Before:

The Honorable L. B. Schwellenbach, Judge.

On February 18, 19, 1943.

At Yakima, Washington.

Appearances:

For the Plaintiff:

Cheney & Hutcheson, Attorneys.

For the Defendant:

Mr. Lyle Keith, U. S. District Attorney
for Eastern District of Washington, and
Mr. Thomas R. Winter, Asst. Counsel,
Bureau of Internal Revenue. [18]

On this 18th day of February, 1942, the above entitled cause coming on for hearing and for trial before the Honorable L. B. Schwellenbach, Judge of the above styled Court, and all parties having announced ready for trial the following proceedings

were had, testimony taken and exhibits introduced:

Mr. Cheney: I take it there is no necessity for an opening statement according to the pre-trial order:

The Court: I am just reading that:

“Pre-Trial Order

This cause duly came on for pre-trial on this day before the undersigned Judge of the above entitled court pursuant to rule 16 of Rules of Civil Procedure for the District Court of the United States; Cheney & Hutcheson appearing as attorneys for plaintiff and Lyle Keith appearing as attorney for the Defendant; and the Court having examined the pleadings and having considered same and having heard the statement of both parties herein:

Now, Therefore, the Court does hereby find as follows:

That the only factual question remaining at issue under the pleadings herein is whether under the circumstances in this case the profit realized from the sale of 11,000 shares of stock in Sunshine Mining Company was taxable to the Yakima Holding Company or to its subsidiary (in which it owned practically all of the capital stock) Yakima First National Bank; and, further, that if the said profit is taxable to the Yakima Holding Corporation [21] whether the Yakima Holding Corporation in making its 1935 Income Tax Return in not reporting said profit was guilty of fraud.

Done in open Court this 4th day of December, 1941.

L. B. SCHWELLENBACH
District Judge."

Mr. Cheney: Your Honor, our theory of the pleadings is, substantially, the only issues of fact are in reference to paragraphs 5, 6, 7, 8 and 9, I think, and a part of 15 and a part of 16——

The Court: There isn't any dispute as to the amount for which the Sunshine stock was sold?

Mr. Winter: No, your Honor, except—the Court may very easily find from the evidence either all of the 11,500 shares were owned by the Holding Company during the year 1935, and transferred that year, or it may find that a number of shares may be in issue—but as to the amount for which sold—there may be some computation as to it, but not issue as to amount for which sold.

The Court: I notice you speak of 11,500——

Mr. Cheney: 12,500 altogether.

Mr. Winter: Of which 11,000 were sold. I made an error on that.

The Court: You may proceed.

Whereupon

CARROLL HULL,

a witness called for and on behalf of the plaintiff,
having been duly sworn, testified as follows: [22]

Direct Examination

By Mr. Cheney:

Q. Your name is Carroll Hull?

A. Yes, sir.

Q. You are a resident of Yakima?

A. Just out eight miles.

Q. You are Secretary of the Sunshine Mining Company?

A. Yes sir.

Q. And as such the records of the Sunshine Mining Company are in your possession and under your control?

A. Yes sir.

Q. I hand you Plaintiff's identification 1——

The Court: Have you examined these records?

Mr. Winter: Your Honor, I have photostatic copies of the stockholders ledger sheets which are the only ones which the Court will be concerned with and I am willing to substitute those with the originals after Counsel has checked them.

The Court: They may not agree those are the only ones we are interested in—why not use those for the ones you do agree on.

Mr. Cheney. That will be all right.

Q. I hand you plaintiff's identification 1 and will ask you if that is the original stock record of the Sunshine Mining company, showing the transfer to and from the name of George H. Bradshaw.

(Testimony of Carroll Hull.)

A. Yes sir.

Mr. Cheney. I offer in evidence Plaintiff's [23] Identification No. 1.

Mr. Winter: No objection.

Plaintiff's Identification No. 1 admitted in evidence.

[Printers Note—Plaintiff's Exhibit No. 1 is set out at page 256 of this printed record.]

Mr. Winter: We don't have that sheet.

Mr. Cheney: This covers generally three certificates of stock in Bradshaw's name. These are the three certificates of stock that eventually are involved in this litigation.

Mr. Winter: That's right. What are the certificate numbers?

Mr. Cheney: 226, 259 and 334 in Mr. Bradshaw's name, showing those were received by him on August 17, 20 and 22, 1934, transferred in his name on those dates, and transferred to Pocock out of that name on April 16, 1935.

Q. I hand you now plaintiff's identification No. 2 the stock ledger, and pages 2, 3, 4 and 5 stockholders account of Alexander Miller, covering the period of time July 28, 1934 down to and including April 25th, 1935. We offer identification 2 in evidence. Now, Gentlemen, the particular purpose of this exhibit refers to page 2, shows the transfer upon the books of five thousand shares from the name of Alexander Miller August 15, 1934, into the name of Yakima First National Bank by certi-

(Testimony of Carroll Hull.)

ficate W 69. And on page 5 shows transfer of five thousand shares from certificate 424 to certificates 2159 to 2208 to the name of Edward M. Pocock.

The Court: Transferred from whom?

Mr. Cheney: Alexander Miller to Pocock's name.

The Court: The date of that?

Mr. Cheney: Named upon the books of the Sunshine [24] Mining Company April 25, 1935.

We offer Identification 2 in evidence.

Mr. Winter: No objection.

Plaintiff's Identification 2—(Pages 2, 3, 4 & 5, Alex Miller acct) admitted in evidence, and becomes Plaintiff's Exhibit 2.

[Printer's Note: Plaintiff's Exhibit No. 2 is set out at page 257 of this printed record.]

Mr. Winter: Do you intend to substitute copies, or photostats of that exhibit?

Mr. Cheney: One or the other.

Mr. Winter: The Court isn't going to be concerned with the books. If you have photostats we have no objection.

Mr. Cheney: Identification 3, being pages 1, 2, 3 and 4 of the Pocock account—

Q. I hand you identification 3, being pages 1, 2, 3 and 4 of the Pocock account, being the original records of the Sunshine Mining register in the name of Edward M. Pocock, between April 16, 1935, and some time in 1939. Do you recognize that?

A. Yes sir.

(Testimony of Carroll Hull.)

Mr. Winter: June 15, I have it. It doesn't make any difference as long as it was after May.

Mr. Cheney: I offer in evidence Plaintiff's identification 2, pages 1, 2, 3 and 4 of the stock register in the name of Edward M. Pocock.

Mr. Winter: No objection.

Plaintiff's identification '3' (pages 1, 2, 3 and 4 Pocock account) admitted in evidence and becomes Plaintiff's exhibit 3.

[Printer's Note: Plaintiff's Exhibit No. 3 is set out at page 261 of this printed record.] [25]

Mr. Cheney: This exhibit starts with the transfer on April 16, 1935 of certificate 226 from the name of George H. Bradshaw to Pocock.

The Court: Those are the same ones we got out of the Bradshaw account?

Mr. Cheney: Yes, also certificates 259 and 334 the same. It also shows the transfer on April 23rd of certificate W69 from the Yakima First National Bank to Edward M. Pocock in a lot of certificates—and on page 3 shows on April 25, 1935, transfer of certificate No. 424 from the account, ledger account of Alexander Miller to Edw. M. Pocock in a large number of 100 shares certificates.

Q. I hand you identification '4' and ask you if that is a ledger account of stock transferred into and out of the name of the Yakima First National Bank?

A. Yes sir.

Mr. Cheney: In reference to this exhibit, Gentle-

(Testimony of Carroll Hull.)

men, the original and copy was put into evidence in the case of Harper vs. Yakima First National Bank and all we got back was this Exhibit——

Mr. Winter: I might explain to the Court we have photostatic copies of the original and if we have a minute to check—there appears to be two items in here——

Mr. Cheney: We offer plaintiff's identification '4' account of the Yakima First National Bank.

Mr. Winter: No objection.

Plaintiff's identification '4' (Account of Yakima First National Bank) admitted and becomes Plaintiff's exhibit '4'.

[Printer's Note: Plaintiff's Exhibit No. 4 is set out at page 265 of this printed record.]

[26]

Mr. Cheney: This shows that on August 15, 1934, a transfer in certificate 5541 in Alexander Miller's name to certificate W 69 in the name of the Yakima First National Bank. It further shows that on the date of April 23, 1935, a transfer in certificate No. W 69 into certificate 2105 to 2154 in the name of Edward M. Pocock—that 5000 shares in 100 share lots.

Q. I show you identification '5', Mr. Hull, is that the original cancelled certificate of Wn 69?

A. Yes sir.

Q. Which would be cancelled when the certificate of stock was transferred upon the books.

(Testimony of Carroll Hull.)

A. Yes sir.

Mr. Cheney: I offer this in evidence.

Mr. Winter: No objection.

Plaintiff's identification '5' (Cancelled stock certificate Wn. 69) admitted in evidence and becomes Plaintiff's Exhibit '5'.

[Printer's Note: Plaintiff's Exhibit No. 5 is set out at page 267 of this printed record.]

Mr. Cheney: Certificate 69, plaintiff's Exhibit '5' stock issued August 15, 1934, stock issued in to the name of Yakima First National Bank, showing cancelled and re-issued in W 2105 to W 2154, and on the back bears the endorsement of Yakima First National Bank by R. M. Hardy, President, April 23rd, 1935, and witnessed by Kenyon.

Identification '6' is cancelled certificate——

Q. I hand you identification '6' and ask you if that is cancelled certificate 424? A. Yes sir.

Q. It would be cancelled in this book upon re-issue of [27] stock in somebody else's name.

A. Yes.

Q. And identifications '7' and '8' are those cancellations of stock in Bradshaw's name, Nos. 226 and 259? A. Yes sir.

Q. And is identification '9' cancelled stock certificate of Wn 334 in the name of George H. Bradshaw? A. Yes sir.

Q. All of these were passed back in to the company upon the re-issue of stock in somebody else's name. A. Yes sir.

(Testimony of Carroll Hull.)

Mr. Cheney: I offer in evidence plaintiff's identifications 6, 7, 8 and 9.

Mr. Winter: No objection.

(Plaintiff's identification '6' (Cancelled stock certificate 424), 7, (Cancelled stock certificate Wn226) 8 (Cancelled stock certificate W 259), 9 (Cancelled stock certificate Wn 334) admitted in evidence, and become Plaintiff's Exhibits 6, 7, 8 and 9, respectively.)

[Printer's Note: Plaintiff's Exhibits No. 6, 7, 8, 9 are set out at pages 270-283 of this printed record.]

Mr. Cheney: That is all from Mr. Hull, just to identify those exhibits.

Mr. Winter: No questions.

Witness excused.

W. J. FUNK,

a witness called for and on behalf of the plaintiff,
having been duly sworn, testified as follows:

Direct Examination

By Mr. Cheney:

[28]

Q. Your name is W. J. Funk?

A. That's right.

Q. Walter Funk, ordinarily. A. Yes.

Q. Are you an officer of the Guaranty Trust Company? A. Yes sir.

(Testimony of W. J. Funk.)

Q. What position do you hold?

A. Vice President and General Manager.

Q. And the Trust Company is the liquidating officer upon the liquidation of both the Yakima Holding Company and the Yakima First National Bank.

A. No, the Guaranty Company is the liquidating agent of the Holding Company, but I, personally, am connected with the First National Bank.

Q. And as liquidating agent of the Holding Company and Trust Company has possession of the books and records of the Holding Company?

A. Yes.

Q. You, yourself, as an officer of the Yakima National Bank have possession of the records of the Yakima First National Bank.

A. Yes sir.

Q. I show you, Mr. Funk, identification '10', is that one of the books and records of the Yakima Holding Company, the original book of entry?

A. Yes, it is.

Q. What is that?

A. Cash disbursement journal.

Q. That is the journal that shows when and for what money was expended by the Holding Company? [29]

A. Yes sir.

Q. Calling attention to page 19, does that have upon it the record of entries of transactions in August, 1934?

A. Yes sir.

Mr. Cheney: I am offering page 19, specifically,

(Testimony of W. J. Funk.)

but have no objection if counsel would rather have the whole book. We offer identification '10'.

The Court: Page 19 shows all the entries for '34?

Mr. Cheney: Yes—disbursements——

The Court: Covers the whole year?

Mr. Cheney: Covers August, 1934.

Mr. Winter: I don't think there is anything more the Court is concerned with. No objection.

(Plaintiff's identification '10' (Cash disbursement journal—page 19—Yakima Holding Company) admitted in evidence and becomes plaintiff's Exhibit 10.)

[Printer's Note: Plaintiff's Exhibit No. 10 is set out at page 284 of this printed record.]

Q. Now, Identification '11' is what?

A. Cash Receipts journal.

Q. That is the record showing the amount of money and from whom the money was received by the Holding Company? A. Yes sir.

Q. And page 39 covers what period of time?

A. March 30th to May 6, 1935.

Mr. Cheney: I offer page 39 of the Cash receipts journal.

Court: Together they constitute your whole cash book?

Witness: Yes——

The Court: Covering all entries of receipts and dis- [30] bursements, by the Holding Company.

(Testimony of W. J. Funk.)

A. Yes.

Mr. Cheney: While Counsel is looking at Exhibit 11——

Q. On Exhibit 10, page 19, on the left hand page appears the following items——“8/17—Y F N B” Who is “Y F N B”?

A. Yakima First National Bank.

Q. “1000 shares Sunshine Mining Company Stock—check No. 7—\$7725.00” and on the same date——“Y F N B—5000 shares Sunshine Mining Company stock, check No. 8, \$40,000.00”

August 18, 800 shares Sunshine Mining Company stock, Check No. 9, \$6320.00.

August 21, 700 shares Sunshine Mining Company Stock, check No. 350, \$5530.

Then on the right hand page——

Mr. Winter: No objection to exhibit ‘11’.

(Plaintiff’s identification ‘11’ (Cash Receipt Journal Yakima Holding Company) received in evidence and becomes Plaintiff’s Exhibit 11.)

[Printer’s Note: Plaintiff’s Exhibit No. 11 is set out at page 285 of this printed record.]

Q. Mr. Funk, plaintiff’s identification 12 is what——what is the whole book?

A. This is the general ledger of the Yakima Holding Corporation.

Q. Identification ‘12’ is what?

A. That is the ledger account of the Sunshne Mining Company stock.

(Testimony of W. J. Funk.)

Q. Now, by the way, is that the ledger account of the Yakima Holding Company in which the entries in the cash [31] disbursement journal were entered and the entries for the cash receipts journal were entered and balanced up the account.

A. This is the ledger account, yes.

Mr. Cheney: I offer identification '12'.

Mr. Winter: No objection.

(Plaintiff's identification '12' (Sunshine Mining Company Ledger Account—Yakima Holding Company) received in evidence and becomes Plaintiff's Exhibit '12'.

[Printer's Note: Plaintiff's Exhibit No. 12 is set out at page 287 of this printed record.]

Mr. Cheney: Your Honor, in the Cash Receipts Journal which is exhibit '11', on page 39 under date of May 1, 1935, we find the following "Yakima First National Bank Sale of 7500 shares of stock Sunshine Mining Company, \$61,451.50. Cash receipts—May 1, Sunshine Mining Company Stock, 5000 shares, at \$12—\$60,000.00 Yakima Holding Company Stock, Investment account, 1119 shares at \$15—. Capital account, 2881 shares at \$15. The total of 4000 shares are covered by certificate 686, dated May 1, 1935, issued to Alex Miller. For explanation see below." Then "under letter dated December 11, 1934, Alexander Miller agreed to exchange 5000 shares stock Sunshine Mining Company at \$12 per share, for 4000 shares stock Yakima

(Testimony of W. J. Funk.)

Holding Company (Corporation) at \$15 per share.” The ledger account is debited as follows: Sunshine Mining Company stock, August 17, 1934, Y F N B 1000 shares \$7.72½—\$7,725.00. 5000 shares—\$8.00, \$40,000.00. August 18, 800 shares, at \$7.90, \$6320.00, and August 21, 700 shares at \$7.90, \$5530. The total amount would be added up in the last column. Then it has August 31, cash transfer fees \$1.50. Then under the numbers it has a total of 7500 shares. [32]

Then January 6, 1935—‘to write up value 25c per share, as of December 31, 1934, C. R. J. 38, \$1875.00.

May 1, YFNB—Alex Miller 5000 shares @ \$12, 60000.00.

That totals up to \$61,451.50.

Then appears May 1, 7500 shares sold C.R.J. 39, \$61451.50.

Also 5000 shares sold—C. R. J. 39 60000.00.

Over in the credit items credit, first, \$61,451.50, then 60,000.00, making a total of \$121,451.50, balancing the account.

Q. Mr. Funk I hand you plaintiff’s identifications ‘13’ and ‘14’—what is the book, first?

A. Check book, including the register.

Q. And the 2 pages ‘13’ and ‘14’?

A. Register of checks written.

Q. And apparently each check was written for what purpose, for Sunshine Mining Company stock purchase? A. Yes.

Q. And is there reference to the Cash Disburse-

(Testimony of W. J. Funk.)

ments Journal (19) on each one of the four referring to the Yakima First National Bank?

A. Yes.

Q. Is that the Cash Disbursement Journal we offered in evidence? A. Yes.

Q. And where it says YFN Bank, to what does that refer?

A. The Yakima First National Bank. [33]

Q. And S.M. Co.

A. Sunshine Mining Company.

Mr. Cheney: I offer identifications '13' and '14' in evidence.

Mr. Winter: No objection.

Plaintiff's Identifications '13' and '14' (Cks No. 347 and 348—349 and 350) received in evidence and become plaintiff's exhibits '13' and '14'.

[Printer's Note: Plaintiff's Exhibits Nos. 13-14 are set out at page 288 of this printed record.]

Mr. Cheney: Calling your Honor's attention—check stub 347, August 17, 1934, \$7775, in favor of Y.F.N.B.—particulars—1000 shares of S.M. Co. stock. The next stub dated August 17, for \$40,000 in favor of Y.F.N.B. for 5000 shares Sunshine Mining Company stock.

Then Exhibit 14, checks 349 and 350, the first being August 18, 1934, for \$6320, in favor of Y.F.N.B.—particulars—8000 shares Sunshine Mining Company stock. The second check of Exhibit 14, August 21, 1934, for \$5530.00 in favor of Y.F.N.B.—particu-

(Testimony of W. J. Funk.)

lars—700 shares of Sunshine Mining Company stock. Your Honor will notice the total is 7500 shares of stock.

Q. What book is that in your hands now?

A. The minute book of the Yakima Holding Company—rather I should say—Corporation—Yakima Holding Corporation.

Q. What is the date?

A. April 12, 1935.

Q. Contained on page 42, 43 and part of 44.

A. That is correct.

Q. And at the end of the minutes appear two signatures, [34]—from your own knowledge are those the signatures of the persons they purport to be?

A. Yes.

Q. Mr. R. M. Hardy, as President, and Mr. George H. Bradshaw, Secretary.

A. Yes sir.

Q. Were they at that time respectively president and secretary of the Yakima Holding Company?

A. Yes sir.

Mr. Winter: You are just offering the one sheet?

Mr. Cheney: Yes.

Mr. Winter: If you stipulate there is no reference whatever in the minutes previous to that date with reference to the purchase of stock for and on account of the bank by the Holding Company, otherwise we want the whole book.

(Testimony of W. J. Funk.)

Mr. Cheney: I don't think there is. To the best of my information there is not.

The Court: Couldn't you stipulate——

Mr. Winter: This is the first time the minutes of the corporation made any reference to the stock here in question.

Mr. Cheney: I think it is. I am not guaranteeing anything of the sort.

Mr. Winter: Unless it is—we will object to just the one minute.

The Court: I will withhold the ruling and leave a space here for the stipulation.

Mr. Cheney: So far as the stipulation is concerned—here is the book in Court and to the best of my information there are no others, but the question of whether or not [35] it is admissible—this is a minute of the Holding Company and the minute should be admissible regardless of whether there are some other minutes in the book. I am willing to stipulate if either party can find anything that would be material there can be no question about it. This minute is the only one I know of is material——

The Court: I will sustain the objection to the admission.

To which ruling plaintiff excepts.

The Court: You are offering it to prove a certain thing——

Mr. Cheney: I am offering it to prove it is the minutes of the corporation and that is all.

(Testimony of W. J. Funk.)

The Court: As to a particular transaction and it may only be admissible as a part of a number of the minutes of that company that refer to that transaction.

Mr. Cheney: It is a complete set of minutes. It refers to no other minutes at all, and is part of a line of information we are putting in—I am willing to offer the entire book—but I am not going to be bound by any stipulation.

The Court: I am not asking you to—I am asking you to look through the book to see if there is any other information or reference in there—it should save offering the whole book. I don't see why both counsel can't get together and see if there is or is not some mention of this transaction in some other minutes.

Mr. Cheney: To the best of my knowledge and information there is none. [36]

The Court: I am asking you to make sure that your knowledge and information are correct.

Mr. Cheney: Well, I will proceed.

Q. Identification '16' is what?

A. A letter written to Mr. Alex Miller by George H. Bradshaw, secretary of the Holding Company.

Q. That is one of the official letters kept in the records of the Yakima Holding Company as of that date and bearing the signature of whom?

Mr. Winter: I object to it—it doesn't appear this witness would know. I don't think he can testify as to whether or not it was written—it doesn't

(Testimony of W. J. Funk.)

appear he was connected with the Yakima Holding Company—it may be files he found or were turned over to him as liquidator.

Mr. Cheney: That's the question I asked him.

Q. Is that a letter found by you as liquidator of the Yakima Holding Company among the files and records of the Holding Company?

A. This is.

Q. On this letter does there appear the signature of any man? A. Yes.

Q. What name? A. George H. Bradshaw.

Q. Does it also bear a notation dated subsequently and signed by somebody's initials?

A. Yes sir, the initials of G. H. B.

Q. Do you know of your own knowledge this is his signature and his initials? A. Yes. [37]

Q. The date is when?

A. The letter is December 11, 1934, and the notation at the bottom April 25, 1935.

Q. Look at identification '17'—what is identification '17'?

A. It's a letter of—a letter to George H. Bradshaw, Secretary Yakima Holding Company, from Alex Miller.

Q. Is it signed by Alex Miller? A. Yes.

Q. Was that letter actually found among the original files and records of the Yakima Holding Company? A. Yes sir.

Q. Where is George H. Bradshaw?

A. He is now deceased.

(Testimony of W. J. Funk.)

Q. And where is Alex Miller?

A. The same.

Q. Both are now dead? A. Yes sir.

Mr. Cheney: We offer in evidence Exhibits '16' and '17'.

The Court: What are the dates?

Mr. Winter: Exhibit '16' December 11, 1934 and identification '17' appears to be December 11, 1934.

Mr. Cheney: Both the same day, are they not?

Mr. Winter: Yes, both the same dates.

Mr. Cheney: I offer them in evidence.

Mr. Winter: May I ask the witness some questions on voir dire?

The Court: Yes. [38]

Questions On Voir Dire

By Mr. Winter:

Q. When were you appointed liquidator of the Yakima Holding Company, or when was the Guaranty Trust Company?

A. I would have to check that on some minutes. Off hand I couldn't say. However, I think it was in the early part of 1937, but I want to check that.

Q. Were you an officer or did you have any connection with the Yakima Holding Company?

A. No sir.

Q. Prior to taking over——

The Court: November 10th, 1936, it is alleged the assets were turned over to the liquidator as liquidating trustee—paragraph 3.

(Testimony of W. J. Funk.)

Mr. Winter: Yes, that is admitted—I wasn't trying to——

Witness: May I ask what date that is.

Q. November 10, 1936. You say what has been marked now for identification No. 16 and 17 were in the files of the Yakima Holding Company at the time you took over the assets? A. Yes sir.

Q. And that is the first time you had any knowledge of them? A. Yes sir.

Q. You are familiar with Mr. Bradshaw's signature, are you? A. Yes sir.

Q. Is Exhibit '16' signed, and was the writing upon the top of this one there at the time you first received [39] them?

A. This is exactly the way it was in the file, yes sir.

Q. Where was the file when you found it? Was that in the Guaranty Trust Company's hands?

A. The records of the Holding Corporation were always kept in the Guaranty Trust Company.

Q. Same office? A. Yes sir, same office.

Q. And also have the same office as the Yakima First National? A. No sir.

Q. They were separate? A. Yes sir.

Q. Next door?

A. A different room next door—nothing there with them.

Q. Now, Exhibit '16' appears to be a copy of a letter—did you make a demand or have you tried to find the original of this letter?

(Testimony of W. J. Funk.)

A. The letter was addressed to Mr. Alex Miller—I never tried to get that.

Q. All you know is you found these two exhibits in the files of the Yakima Holding Company.

A. Yes, those two letters were the original records of the transactions of the Yakima Holding Corporation.

Q. You mean the records which you found. You don't know of your own knowledge whether or not they were records of the transactions except what they show on the face.

A. That is correct.

Q. And you say you know Mr. Alex Miller's signature? [40]

A. Yes sir.

Q. And you found these records there on November 10th, or in November, 1936, when you went in there.

A. Yes sir.

Q. Of course, you don't know when they may have been written, and when they may have been placed in the files prior to that time, do you?

A. No.

Mr. Winter: I object to them, if the Court please, on the ground they have not been shown to have been dated—they appear to have been dated and found in the files, but this witness has no knowledge as to whether they may or may not have been written.

The Court: They may be admitted. Objection overruled.

Plaintiff's identifications '16' and '17' (16—copy of letter Bradshaw to Miller—12/11/34) and ('17' Letter Miller to Bradshaw 12/11/34) admitted in evidence and become Plaintiff's exhibits '16' and '17'.

(Testimony of W. J. Funk.)

[Printer's Note: Plaintiff's Exhibits Nos. 16-17 are set out on pages 312-313 of this printed record.]

Mr. Cheney: I have examined the record and the minutes of April 12, 1935, are the only minutes of the Holding Company for the period involved in this dispute. I will hereby stipulate this is the only minutes that refer to that transaction.

The Court: Then I will admit Plaintiff's '15'.

Plaintiff's identification '15' (Minutes of April 12, 1935, Yakima Holding Company) admitted in evidence and become Plaintiff's Exhibit '15'.

[Printer's Note: Plaintiff's Exhibit No. 15 is set out at page 289 of this printed record.]

Mr. Cheney: If I may at this time I would like to [41] read the material part of these minutes.

"A meeting of the executive committee of the Yakima Holding Corporation was held in the office of the Yakima First National Bank on Friday, April 12, 1935, at 3:00 P. M.

Those present Messrs. Hardy, Bradshaw, Rightmire and Clift.

Mr. Hardy stated there were several matters that required action by the executive committee and stated that the first matter was a proposal to Mr. Alex Miller to exchange 4000 shares of stock of the Yakima Holding Corporation for 5000 shares of Sunshine Mining Company stock on the basis of placing a value of \$15 per share

(Testimony of W. J. Funk.)

on the stock of the Holding Corporation and \$12 per share on the stock of the Sunshine Mining Company. This proposal was made to Mr. Miller under date of December 11, 1934; and accepted by him. It was then moved by Mr. Clift, seconded by Mr. Rightmire, that we approve and ratify the proposal for the exchange of stock as outlined and authorize its completion. Carried."

Exhibit 16: Reads:

"Mr. Alex Miller, Yakima, Washington.

Dear sir: Referring to conversations which we have had recently regarding the exchange of some stock of the Yakima Holding Corporation for stock of the Sunshine Mining Company, I wish now to make the definite proposition that we will exchange four thousand shares of Yakima Holding Corporation stock for five thousand shares of Sunshine Mining Company stock. This is putting a value of \$15 per share on the stock of the Holding Company and [42] \$12 per share on the stock on the Sunshine. Yours very truly, Geo. H. Bradshaw, Secretary."

And at the bottom of that letter: reads:

"April 25, 1935.

Delivered Sunshine Cert. for 5000 shares to Mr. Hardy.

G. H. B."

Exhibit '17': Reads:

"December 11, 1934.

(Testimony of W. J. Funk.)

Mr. George H. Bradshaw, Secretary
Yakima Holding Corporation
Yakima, Washington

Dear sir:

Referring to your letter of this date, in which you offer to exchange four thousand shares of Yakima Holding Corporation stock for five five thousand of Sunshine Mining stock, I wish to advise you of my acceptance of this offer of exchange.

Yours very truly,
ALEX MILLER."

Q. Identification '18'—is that a letter found by you in the records of the Guaranty Trust Company as part of their regular files? A. It is.

Q. And is a letter written by whom to the Guaranty Trust Company?

A. Written by Alex Miller to the Guaranty Trust Company.

Mr. Cheney: I offer in evidence Plaintiff's Identification '18'.

Mr. Winter: No objection. [43]

Plaintiff's identification '18' (Letter Alex Miller to Guaranty Trust Co. 12/11/34) received in evidence and becomes Plaintiff's Exhibit 18.

[Printer's Note: Plaintiff's Exhibit No. 18 is set out at page 314 of this printed record.]

Q. Identification '19' in your hand is what?

A. A letter from George H. Bradshaw, Secretary

(Testimony of W. J. Funk.)

of Yakima Holding Corporation to the Yakima First National Bank.

Q. Is that letter signed by George H. Bradshaw—is that his signature? A. Yes.

Q. At the bottom of that letter appears another signature—whose is that?

A. H. F. Crawford, Cashier of the First National Bank.

Q. Was he such cashier on December 12, 1934?

A. Yes sir.

Q. Is that his signature? A. Yes.

Q. Was that letter turned over to you as liquidator of the Yakima First National Bank and also part of the proceedings of liquidation of the Yakima Holding Company? A. It is.

Mr. Cheney: I offer this in evidence.

Q. You have no personal knowledge whether or not the letter was written on the date specified, that is, of your own knowledge? A. No.

Mr. Winter: May I question him on voir dire?

The Court: Yes, surely. [44]

Questions on Voir Dire

By Mr. Winter:

Q. Who had possession of this letter at the time you took over the assets of the Yakima Holding Corporation as liquidator.

A. The Guaranty Trust Company.

Q. Where did you find this letter?

A. That letter was in the files of the Guaranty Trust Company.

(Testimony of W. J. Funk.)

Q. What file—under letter file or minute book or what?

A. That was in the letter file.

Q. Letter file—a file in the name of the Yakima National Bank?

A. I presume it was.

Q. Have you got the file or can you produce the file in which you found it?

A. I doubt whether I could.

Q. Have you any independent recollection where you found it and as to when you found it?

A. Yes, I remember that.

Q. When?

A. Not the date. But during that period. But I found it in our letter files.

Q. When you say 'our'—

A. I am talking about the Guaranty Trust Company when I talk about 'our' letter files.

Q. Has it always been in the Guaranty Trust Company files even prior to the liquidation? [45]

A. I would have no reason to believe it wasn't. Any paper of that kind we would hold in the letter files and it would be there permanently.

Q. You are speaking of the Guaranty Trust Company or of the Holding Corporation—which?

A. I am speaking about the Guaranty Trust Company now—the Holding Corporation papers would be in the Holding Corporation files—in other words, that's a trust account.

Q. You say you found this in the Guaranty

(Testimony of W. J. Funk.)

Trust Company files—is that the first time you found it was when you found it there?

A. Yes sir.

Q. You never saw it in the files of the Yakima Holding Corporation turned over to you?

A. No sir.

Q. Or the files in the bank?

A. It was not in the files of the bank, no.

Mr. Winter: We object, if the Court please, on the ground—we don't deny the existence of a writing—a self evident writing in here, but we do not believe it is established by this witness that the letter was written on the date it is supposed to have been written. The document was just found in the files and that's as far as it may be testified to.

Mr. Cheney: If I may continue reading from the minutes, Exhibit '15'—

“The Secretary then stated that at the time this transaction with Mr. Miller was discussed by the officers an understanding was reached that if the transaction were [46] completed that the Yakima First National Bank would take over from the Yakima Holding Corporation the 5000 shares of Sunshine at \$15 per share, also the 7500 shares of Sunshine stock already owned by the Yakima Holding Corporation at the cost price of same, all in accordance with a letter setting out this understanding dated December 12, 1934, from the Secretary to the bank and approved by the bank”——

(Testimony of W. J. Funk.)

Mr. Cheney: I also call your attention in the Cash Receipts Journal, Exhibit 11, states:

“For explanation see below:” In other words, for explanation of the transaction whereby they received some \$121,000—“Under date of letter 12/11/34 Alexander Miller agreed to exchange 5000 shares stock Sunshine Mining Company @12 per share for 4000 shares stock Yakima Holding Corporation @ \$15 per share”

Mr. Winter: Both of those exhibits were written in 1935. They admit they didn't write anything in the minutes or make any notation in the books—the stock was carried in the name of the Holding Corporation as its assets and its property, and now the document, if the Court please, is attempting to build up from 1935 back, not having been shown to have been written or already existing at that time. All we know now it was found by this witness in the records of the Guaranty Trust Company when the gentleman went there in 1936.

The Court: When you say ‘35’ you refer to the minutes being written in 1935?

Mr. Winter: Yes. [47]

The Court: There is reference in these minutes to a letter written in '34—the letter you referred to in the minutes—

Mr. Cheney: December 12, 1934—that is the first letter as to the exchange between Miller and Bradshaw—that exchange was December 11, 1934—(reading from '15'—“also the 7500 shares of Sun-

(Testimony of W. J. Funk.)

shine stock already owned by the Yakima Holding Corporation at the cost price of same, all in accordance with a letter setting out this understanding dated December 12, 1934, from the Secretary to the bank," (dated, if your Honor please, December 12, 1934) "from the secretary to the bank and approved by the bank".

The Court: All right. Let's go back and see what you are trying to prove. You are trying to introduce a letter by somebody now dead——

Mr. Cheney: Its part of a chain of circumstances. The fact the letter was written isn't denied.

Mr. Winter: We don't deny it was written on some date, but——

The Court: They don't deny it was written on some date, but put you on strict proof when it was written—by whom written——

Mr. Cheney: It doesn't prove yet the date it was being written. I asked the gentleman and he said he had no personal knowledge it was written on that date. I am not offering this witness to prove it was written on that date. I am not doing that at all this time. It's merely a question of admissibility under the pleadings [48] when the letter is not denied.

Mr. Winter: It seems to me a ruling should be withheld until Counsel puts on their proof that he says he has.

The Court: The issue that is made by the pleadings is whether or not the letter was written on

(Testimony of W. J. Funk.)

December 12, 1934. Now this letter, and the admission of it on the basis of present testimony doesn't attempt to prove it was written on December 12, 1934, and its admissible only as preliminary to enable them to submit proof it was written on that date, if they can submit such proof. Now, you not having denied the writing of the letter, and placing your objection purely on the date it was written I think I will admit the letter—

Mr. Winter: Your Honor, we admit there was a sheet of paper and it purports to have been written and signed upon that day. We couldn't deny the existence of the paper which is shown to us in '35 or '37 which our investigation——

The Court: I will admit it to the same extent—you admit there was such a paper—

Mr. Winter: That it was found there, yes.

The Court: I will admit it as purely preliminary—

Mr. Cheney: And that it is what it purports to be without passing on the question——

The Court: Yes, for a limited purpose.

(Plaintiff's identification '19' admitted qualifiedly, and becomes Plaintiff's Exhibit '19' to that extent.)

[Printer's Note: Plaintiff's Exhibit No. 19 is set out at page 315 of this printed record.]

Q. Identification of '20' is what?

A. Two cashiers checks. [49]

(Testimony of W. J. Funk.)

Q. Drawn by whom and payable to whom?

A. Yakima First National Bank to Yakima Holding Company.

Q. And the date?

A. Dated April 30th, 1935.

Mr. Cheney: We offer these in evidence.

Mr. Winter: No objection.

(Plaintiff's identification '20' (Cashier's checks (2) YFNB to Yakima Holding Co., 4/30/35) admitted in evidence and becomes Plaintiff's Exhibit '20'.)

[Printer's Note: Plaintiff's Exhibit No. 20 is set out at page 317 of this printed record.]

Mr. Cheney: The first check is for \$61,451.50, which is exactly the amount of money plus the write up of the 7500 shares of stock that was purchased. The second check is for five thousand shares of stock at \$12 a share which is \$60,000, which are the exact figures entered upon the books.

Q. Identification '21' Mr. Funk, is what?

A. One is a cashier's check from Yakima First National Bank payable to the Yakima First National Bank dated May 1, 1935, and another check to Yakima Holding Company, dated April 30, 1935. I offer both checks in evidence.

Mr. Winter: No objection.

(Plaintiff's identification '21' received in evidence and becomes Plaintiff's Exhibit '21'.)

[Printer's Note: Plaintiff's Exhibit No. 21 is set out at page 318 of this printed record.]

(Testimony of W. J. Funk.)

Mr. Cheney: Both of these checks on the back of them has the endorsement May 2, 1935, by E. R. Hoffman——

Q. Where is he? A. He is dead.

Q. Died in 1938, didn't he? [50]

A. Yes, that is the approximate date.

Q. Identification '22' is what—explain each sheet.

A. The first one here is a credit ticket used in banks to make transfers of accounts—credit stocks, bonds and securities of \$121,451. This is made up of sales of Sunshine Stock, one item of \$61,451.50, and the other for \$60,000. This item here was deposited to the Yakima Holding Company from Yakima First National Bank——

Mr. Winter: Now, your Honor, it doesn't appear this witness knows what they are except by hearsay——

Mr. Cheney: I offer them in evidence.

Mr. Winter: (Q.) These are further files that you found?

A. In the Yakima First National Bank.

Q.. You are connected with the Yakima First National Bank? A. At one time.

Q. Where did you get these papers?

A. I got them as liquidating agent.

Q. These are papers and records you took over as liquidating agent of the Yakima First National Bank? A. Yes sir.

Q. Thats all you know about it except what they show on their face. A. Yes sir.

(Testimony of W. J. Funk.)

Q. (By Mr. Cheney): Other records of the bank will reflect these same items?

A. That's right.

Mr. Winter: I would like to ask one more question— [51]

Mr. Cheney: I might say the exhibits already in show the source of this money on the same dates and the same amounts.

Mr. Winter: If there is no issue about it then it is surplusage, and I object to it then on that ground.

Mr. Cheney: They are part of the original documents.

The Court: They may be admitted.

(Plaintiff's identification '22' (Credit memo and deposit slip Yakima Holding Co.) admitted in evidence and becomes Plaintiff's Exhibit '22'.)

[Printer's Note: Plaintiff's Exhibit No. 22 is set out at page 319 of this printed record.]

Q. I notice on one side of this the initials 'E. P.H.' Would that be E. P. Hoffman?

A. Yes sir.

Q. Identification '23', Mr. Funk, what is that?

A. That's a credit ticket used in the bank to put money in undivided profits. It shows two cashier's checks deposited to undivided profits, totaling \$77,773.95, dated May 2, 1935.

Q. Calling your attention to plaintiff's exhibit

(Testimony of W. J. Funk.)

'21' is that a credit memorandum reflecting the two cashiers checks in exhibit 21? A. It is.

Mr. Cheney: We offer identification 23.

Mr. Winter: No objection.

(Plaintiff's identification '23' (Credit memo undivided profits account Y.F.N.B. 5/2/35) received in evidence and becomes Plaintiff's Exhibit 23.)

[Printer's Note: Plaintiff's Exhibit No. 23 is set out at page 320 of this printed record.]

Q. I hand you identification '25'. What is that?

A. This is a ledger sheet showing undivided profits account of the Yakima First National Bank.

[52]

Q. Covering what period?

A. December 1, 1934, to May 20, 1935.

Q. That is the original ledger sheet of the bank?

A. That is.

Mr. Cheney: I offer this in evidence.

Mr. Winter: I don't see the materiality of it—I don't see the materiality of all of this evidence. We are not trying this case before a jury, its just cluttering up the records. We have no objection to the exhibit except it is surplusage.

The Court: I don't think I want to limit the plaintiff. They have their own idea about how to try their case. Let them try it that way. It will be admitted.

(Plaintiff's identification '25' (Undivided

(Testimony of W. J. Funk.)

profits account Yakima First National Bank) admitted in evidence and becomes Plaintiff's Exhibit 25.)

[Printer's Note: Plaintiff's Exhibit No. 25 is set out at page 322 of this printed record.]

Q. When you became liquidator of the bank did you find among the assets of the bank 1500 shares of Sunshine Mining stock?

A. I did.

Q. Was that stock sold by you as liquidator for the Yakima First National Bank?

A. It was.

Q. I hand you identification '24' and ask you if that is the sales receipt representing the sale of that stock?

A. This is. I received this personally.

Q. You received the money and made the sale.

A. Yes sir.

The Court: As liquidator? [53]

A. Of the Yakima First National Bank, yes.

Mr. Winter: I object to the exhibit on the ground its not within the issues of this case, and its not any stock here involved—its stock acquired by the Yakima National Bank after the period here involved and is not within any of the issues and is not a part of the 12,500.

Mr. Cheney: It is—that is the only stock the First National Bank ever owned is the 12,500 shares in question.

(Testimony of W. J. Funk.)

Mr. Winter: It is not a part of the 11,000 on which the profit here is in question.

The Court: I will admit it. I've lost track of what Mr. Cheney is doing a long time ago.

(Plaintiff's identification '24' (Receipt for sale of Sunshine stock by liquidating agent) received in evidence and becomes Plaintiff's Exhibit 24.)

[Printer's Note: Plaintiff's Exhibit No. 24 is set out at page 320 of this printed record.]

Mr. Cheney: Have you any objection to '26'?

Mr. Winter: No objection.

Mr. Cheney: This is the 1935 return of the Yakima First National Bank.

Mr. Winter: A certified copy, your Honor.

The Court: It may be admitted.

(Plaintiff's identification '26' (Income Tax Return 1935 Y.F.N.B.) received in evidence and becomes Plaintiff's Exhibit 26.)

[Printer's Note: Plaintiff's Exhibit No. 26 is set out at page 327 of this printed record.]

Q. Identification '27'—that is a true and correct copy of the income tax return filed by you as liquidator of the Yakima First National Bank in 1938? A. This is, yes sir.

Q. Does that report the sale of the 1500 shares of [54] stock?

Mr. Winter: We object to having him state what the report shows—its the best evidence in itself.

Objection sustained.

(Testimony of W. J. Funk.)

The Court: This is the bank's return for 1938?

Mr. Winter: We object to it on several grounds. First, its not the best evidence—it appears to be a copy of the original record, no demand for which has been made which would have been produced had such demand been made. Second, it involves a year three years later, and does not involve any issue within this case—what the bank or trustee or trust company or somebody else may have done in 1938 with respect to the profits involving the sale of some other stock, or how reported, would only be pulling themselves up by their boot straps, so to speak. I realize its just being offered for a basis of argument for that purpose, and we object to it on the grounds it does not involve the profit here involved, and it is not the best evidence. It appears to be a copy of the original document, and we have no way of checking it with the original and no demand made upon us for the original.

The Court: I will hear from you on the first ground, that it is a copy and you made no demand for the original.

Mr. Cheney: It is a typewritten copy of the original passing between the parties to the law suit. No demand has been made and I think upon that ground the objection is well taken. I have no argument on that question at all. [55]

The Court: Are you withdrawing the identification '27'?

Mr. Cheney: I will leave it in for the time being. Other things may happen, your Honor.

(Testimony of W. J. Funk.)

We offer the 1935 return purported to be a certified copy thereof of the Yakima Holding Corporation just received from Mr. Winter.

Mr. Winter: No objection.

(Plaintiff's identification '28' (Income Tax return 1935 Yakima Holding Corporation) received in evidence and becomes Plaintiff's exhibit 28.)

[Printer's Note: Plaintiff's Exhibit No. 28 is set out at page 367 of this printed record.]

Mr. Cheney: That will be all for the present, Mr. Funk.

Cross Examination

By Mr. Winter:

Q. When did the Yakima Holding Company sell its assets? Did you as liquidator sell the bank, or were the assets sold before you were liquidator?

A. The Yakima Holding Company didn't sell its assets—it hasn't sold its assets, there are still some assets remaining to be liquidated.

Q. When did it sell its banking business?

A. That was in August or September, 1935, I am not sure of that date—that's the way I recall it.

Q. That was when you were with the Guaranty Trust Company, at that time? A. Yes.

Q. You had no connection with the bank at that time? A. No. [56]

Q. You don't know what it sold at the time it sold its banking business? A. No.

(Testimony of W. J. Funk.)

Q. Or as to the assets it shows it owned at that time?

A. I have all the original records of the bank.

Q. Have you the record of the assets which were sold when it sold its banking business?

A. Yes.

Q. Will you produce it for me?

Mr. Cheney: Object to that as improper cross examination. There is no question over identity of the records.

Mr. Winter: It has something to do with the exhibit which was introduced, Exhibit 24—I think I have no further questions. I will withdraw the question.

(Witness excused.)

HOWARD NIMMONS,

a witness called for and on behalf of the plaintiff,
having been duly sworn, testified as follows:

Direct Examination

By Mr. Cheney:

Q. You are connected with Drumheller and Ehrlichman of Seattle. A. Yes.

Q. And that Company in 1934 and '35 was known as Drumheller, Ehrlichman & White?

A. Yes.

Q. It's the same company—only has changed the name [57] is that it? A. That's correct.

(Testimony of Howard Nimmons.)

Q. In 1934 Drumheller, Ehrlichman & White had a branch office in Yakima? A. Yes.

Q.. And that was run by Ross Spencer?

A. Yes.

Q. I believe you were subpoenaed by the Government to bring what records you had in reference to certain stock certificates.

A. I have been unable to find certificate numbers in our records—

Q. Have you brought the original records you have in reference to any dealings you had at or about the time in question, which is April, 1935?

A. Yes.

Q. Will you produce them please?

Mr. Winter: We asked for from November 15, 1934.

Mr. Cheney: There isn't any.

Witness (Handing document to counsel): That will cover the entire period.

Q. That's the complete account of the Yakima First National Bank?

A. Yes, that is their complete account, all transactions.

Mr. Winter: Covering the transactions of the Sunshine Mining Company stock?

A. Yes, their complete account.

Q. In reference to Drumheller, Erlichman & White [58] in 1935 who was Edward Pocock?

A. He was the registered nominee for Drumheller and White.

(Testimony of Howard Nimmons.)

Q. In other words stock was transferred into his name? A. Yes.

Q. And stock in his name was stock presumably belonging to and under the control of Drumheller, Erlichman and White. A. Yes.

Q. Now, referring to identification 29, does that show your transactions—transactions of Drumheller, Erlichman and White with the Yakima First National Bank? A. Yes.

Q. Now, at the same time do you also have some records forwarded to you from the Yakima office showing receipt by Drumheller, Ehrlichman & White from the Yakima First National Bank of some stock from April 23, about that time, to April 25th, 1935? A. Yes.

Q. Will you produce that, also?

(Documents produced and marked as identification '30'.)

Q. Now, does Identification '30' show whatever records you have that shows the receipt—does it show all the the Sunshine stock you received—is it the only record you have showing the receipt of Sunshine stock from the Yakima First National Bank during the month of April, 1935?

A. Yes, the only records we have.

Q. Those three sheets represent all the Sunshine [59] stock received by Drumheller, Ehrlichman and White so far as you know, during the month of April, 1935.

(Testimony of Howard Nimmons.)

A. I can't say as to that. As far as I know this represents 12,500 shares.

Q. 12,500 shares? A. Yes.

Mr. Winter: Isn't the witness a little confused? 11000 shares is all that was sold.

Mr. Cheney: 12,500 was received.

Mr. Winter: But only 11,000 was sold, is that right?

Witness: Apparently some was sold back to the bank—I mean some was delivered back to the bank.

Q. And the sheets, identification '29' show all the stock you sold for and on behalf—sold for or bought from the Yakima First National Bank during the period of April, 1935. A. Yes.

Q. And '30' shows, so far as you know, the receipt of the stock from the Yakima First National Bank, Sunshine stock in April, 1935.

A. Yes.

Q. And does account for 12,500 shares.

A. Yes.

Mr. Cheney: I offer these in evidence.

Mr. Winter: A few questions on voir dire, please.

Questions on Voir Dire

By Mr. Winter:

Q. When you received the stock from the bank, the Sunshine Mining Company stock, did you issue a receipt for the stock? [60]

A. That was issued to the bank—

Q. Do these records show the stock was re-

(Testimony of Howard Nimmons.)

ceived here in Yakima, or does it show where they were received?

A. Yes, I believe it does. "Yakima, Washington. Inclosed securities received by this office today".

Q. Does your record show on whose account the bank was selling the stock—whether for its own account or—

Mr. Cheney: Oh, I object to that—

Q. Does that show to whose account the bank might have been selling the stock? A. No.

Q. Your exhibit shows hundreds of transactions of Sunshine Mining Company stock in addition to the 12,000 shares which we are talking about.

A. Yes a number of other transactions of the Sunshine stock.

Q. The account is Yakima National—Yakima First National Bank and no others.

A. That's right.

Q. Yakima First National Bank is the name of the account. A. Yes.

Q. Who has your records now, your bank records, were they all sent over to Seattle?

A. No, it is my understanding they were destroyed.

Q. Do you know Mr. Spencer's signature?

A. Yes.

Q. You say in connection with the exhibit you did issue—when you received the stock you issued a receipt for it. [61] A. Yes sir.

(Testimony of Howard Nimmons.)

Mr. Cheney: He couldn't know what Spencer did—it would be purely hearsay—he was not in Yakima, and I object to it. I also object that it is not a proper examination of the record I have offered in evidence.

Mr. Winter: We don't want to hold Mr. Nimmons over here and that is the reason why Mr. Cheney put him on more or less out of turn as his witness, and if I may at this time ask the witness to identify the signature of Mr. Spencer in the event he is not going to be available to find out where the original records, if he knows, might be.

The Court: That is not proper voir dire examination on '29' and '30'.

Mr. Winter: No, your Honor, we have no objection to the exhibits.

Plaintiff's identification '29' (Ledger sheets of Drumheller, Ehrlichman & White acct. of Y.F.N.B.) admitted in evidence and becomes Plaintiff's exhibit '29'.

[Printer's Note: Plaintiff's Exhibit No. 29 is set out at page 394 of this printed record.]

Plaintiff's identification '30' (Receipt for S. S. Mining Co. stock from Y.F.N.B.) received in evidence and becomes plaintiff's exhibit '30'.

[Printer's Note: Plaintiff's Exhibit No. 30 is set out at page 413 of this printed record.]

(Testimony of Howard Nimmons.)

Q. This exhibit 29—does that show what stock certificates were sold for—any certain price?

A. No, it does not.

Q. From examining Exhibit 29 it is a fact, is it not, that based upon the dates of the receipt of the stock shown by Exhibit 30, that your judgment is based from this record the first of that stock sold commences [62] with the item of 1300 shares under date of the 23rd of April, being the first date of a sale?

A. That would be my judgment, yes.

Q. What is the last date as near as you can tell—what date does that appear on—from your own knowledge of the books and records.

A. Well, the last transaction appears to be on the 26th of April, 1935.

Q. And the money those sales run up into is, roughly, \$199,000 and some hundred dollars, is it not?

A. Yes.

Q. Do you know what the total of those figures are—didn't you total them up, Mr. Nimmons?

A. I am afraid I don't have the total—yes, the total is \$199,000 some dollars.

Q. I believe in checking it over you found it was some \$97 more than the figures in the complaint.

A. Yes.

Q. That could be accounted for as I understand it by insurance, postage, and so forth.

A. It might be, yes—

Q. Or transfer fees—transfer fee would account for part of it?

A. Yes, thats possible.

(Testimony of Howard Nimmons.)

Q. Now, in reference to this sum of money did you remit to anybody for that stock?

A. Yes, we remitted to the Yakima First National Bank.

Q. Do you have the checks by which you made these remittances? [63] A. Yes.

Q. Now, also, the ninety seven could, also, be accounted for, could it not, by some change in the date upon which some of these sale certificates were sold? A. Yes, that is possible.

Q. Now, the checks you have in your hand represent as near as you know the payment for the sale of stock shown in exhibits '29' and '30'—as near as you are able to show. A. Yes.

Q. And that same applies to the last one you have on here—dated May 2, 1935.

A. Its possible that applies to somebody else—those represent check for all sold in this period.

Mr. Winter: There is no issue they did not remit for all of the stock which they sold for the account of the bank.

Mr. Cheney: You will admit this stock was sold by Drumheller, Ehrlichman and White for the account of the Yakima First National Bank and paid the bank for them?

Mr. Winter: We admit the stock was sold thru the account of the Yakima National Bank, the stock having been delivered to the bank for that purpose and that purpose only as shown by the receipts issued by the Bank to be transferred. It

(Testimony of Howard Nimmons.)

was paid thru the securities department of the Bank as were lots of other sunshine mining company stock delivered to them for that purpose. [64]

We know there was paid to the First National Bank on the 11,000 shares the amount alleged and there is no issue on that. We are going to object to all of the checks in view of the uncertainty of the testimony. (Referring to exhibit for identification marked '31')

Q. All of the Sunshine stock sold during the month of April, 1935, when sold the proceeds were remitted direct to the Yakima First National Bank by Drumheller, Ehrlichman and White, after the receipt of the first stock by the Yakima office?

A. Yes, the record indicates the checks were made payable to Yakima First National Bank.

Q. And you have the record showing that fact?

A. Yes.

Q. They were paid to the Yakima First National Bank.

A. Yes.

Mr. Cheney: That's all.

Cross Examination

By Mr. Winter:

Q. Let's see if I understand it; with respect to this exhibit '29'—can you state of your own knowledge as to when and on the dates the stock was sold which was delivered to you by the Yakima First National Bank, or does that exhibit show it precisely—show it to me—or point it out to the Court.

(Testimony of Howard Nimmons.)

A. No that is impossible from this statement to identify the certificates sold.

Q. Well, the Yakima First National Bank conducted a securities department, didn't they?

A. I am not aware of that. [65]

Q. The exhibit shows there were hundreds of transactions in addition to the transactions involved—in addition to this 11,000 shares——

Mr. Cheney: I object to that as irrelevant. The exhibits speak for themselves. Its also argumentative.

The Court: This is cross examination. He is entitled to argue a little bit on cross examination.

Q. Were you familiar with the First National Bank and all of its affairs? A. No.

Q. All you are testifying to is as to the exhibits which are in your hands. I mean the files in your office made in due course of business.

A. That is correct.

Q. As to whether or not the Yakima First National Bank owned the stock or whether it was being sold thru their account for somebody else, you wouldn't know.

A. No, it isn't necessary for us to know that.

Q. And you have no record to show that.

A. No.

Q. Do you have an account for the Yakima Holding Company? A. No.

Q. And you issued your receipts, as I understand, it is your practice and custom to issue re-

(Testimony of Howard Nimmons.)

ceipts for the stock you received for sale for customers. A. Yes.

Mr. Cheney: I object to him asking the witness for hearsay. What was done by the Yakima office when he [66] wasn't there—

Witness: That was the practice.

Q. Did you use the same form of receipt?

A. Not necessarily.

Q. Were you familiar with the form of receipt issued in 1935 by the firm of Drumheller, Ehrlichman & White? A. I am.

Mr. Winter: This may not be proper cross examination—

Mr. Cheney: Go ahead.

Q. I show you what has been marked for identification Government's Exhibit 'A'—

The Court: How long were you with the Drumheller firm?

A. For over twelve years.

Q. You were there at the time these transactions took place? A. Yes.

Q. What was your position there?

A. I was a bookkeeper at that time.

Q. Were you familiar with the practice of the Drumheller firm as to handling these accounts?

A. Yes.

Q. Was there a uniform practice as between the various offices in Yakima, Tacoma and Seattle—a similar bookkeeping system set up for each office?

(Testimony of Howard Nimmons.)

A. Yes, we have a number of offices and the practices were similar.

Q. You did handle accounts for banks which had a securities department. A. Yes.

Q. You had an account with the First National Bank [67] of Seattle?

A. I don't recall that.

Q. Do you remember any particular bank that handled the sale of certificate?

A. Yes, the Pacific National Bank for one.

Q. In your system of keeping books do you make any distinction as to who owned the stock or whom the bank is representing—is there anything in your books that shows that?

A. Very often the title of the account would be 'Pacific National Bank, Trustee'—or Trust account so and so, Pacific National Bank.

Q. Would that indicate any particular reference to the particular customer of the Pacific National Bank you were dealing with?

A. No. We would have an account with the Pacific National Bank which we understood was their own account, then in addition to that we would have these Trustee accounts.

Q. If it wasn't a trustee account was that an indication that it was the property of the bank itself?

A. Well, that would be the assumption, yes.

Q. You had no way of knowing?

A. No, we had no way of knowing if we were not informed.

(Testimony of Howard Nimmons.)

Q. (By Mr. Winter): I will show you what has been marked for identification 'Defendant's Exhibit A', and ask you whether or not you are familiar with Mr. Spencer's signature.

A. Yes, that appears to be his signature. [68]

Q. I will ask you whether or not—those appear to be photostatic copies of what?

A. Of receipts—securities receipts.

Q. They are Drumheller, Ehrlichman & White's usual form of receipt?

A. Yes, this is the form used in a number of offices.

Q. And that is Mr. Spencer—

A. Mr. Spencer's signature, yes.

Q. Now, taking what has been marked defendant's identification 'A' and checking it with your exhibit showing the receipts of stock—(P. Ex. 30)—I will ask you to state to the court whether or not—

Mr. Cheney: Now I object to the interrogation as to an alleged photostatic copy of something—Mr. Spencer, Ross Spencer, the gentleman involved there, lives in Yakima, has an office in Yakima—there has been no notice served on us to produce any original document—there has been no subpoena and I object to the interrogation.

The Court: Its rather difficult for me to pass upon a question when you don't give him a chance to ask the question. He asks two or three words—he said 'I will ask you to state to the court——' —

(Testimony of Howard Nimmons.)

there is nothing objectionable in that so far. Objection overruled.

Q. Will you please explain to the court whether or not your exhibit, plaintiff's exhibit 30, which is what you call ledger sheets or receipts—

A. That is what we call a letter of transmissal. With this letter would be the securities sent to the [69] Seattle office.

Q. Where is that letter sent from, Exhibit 30?

A. From Yakima to our office in Seattle.

Q. What does the transmissal letter show? What was the general practice—

Mr. Cheney: I object as to what was the general practice—

Mr. Winter: I withdraw that question—I said what does the exhibit show with respect to the receipt of stock?

A. It says "Inclosed securities received by this office today—2500 Sunshine mining stock—Yakima First National Bank—certificates 2030 to 2062, inclusive" they are merely transmitting those securities to Seattle.

Q. Would the receipt for the stock cover the same information?

A. Yes, that was the practice.

Q. I want you to check that information on that exhibit with the exhibit 29 and tell the Court whether or not it shows the same information.

Mr. Cheney: I object to him testifying as to

(Testimony of Howard Nimmons.)

some proposed exhibit until it is received in evidence.

Objection overruled.

Mr. Winter: Are you objecting because this is a photostatic copy—is that the basis of it?

Mr. Cheney: Certainly it is. I will make a demand on you to produce the original—

The Court: I want to get all the information I can on this and I want you gentlemen to get all the information you need. If it is improper I will disregard it. This witness wants to get back to Seattle. Let's get the testi- [70] mony in and then we can argue the admissibility afterward.

Q. What does the proposed exhibit—the first receipt shown on the exhibit—what does that show? Does that show the same information as shown on the first sheet of Exhibit '29'?

Mr. Cheney: Object to that——

Objection overruled.

A. No, it doesn't show the same information for the reason the certificate numbers are different. You will probably find that these are in the names mentioned in the previous testimony and that these are in the name of Edward M. Pocock. It was the practice at that time before sending securities to Seattle to have them transferred to the name of our nominee.

Q. The letter of transmissal of April 16 covers 2500 shares. A. Yes.

(Testimony of Howard Nimmons.)

Q. The receipt 6519 in defendant's proposed Exhibit 'A' covers 2500 shares. A. Yes.

Q. The receipt is dated April 16, and the letter of transmissal April 16. A. Yes.

Q. The name of the account is the Yakima First National Bank in each. A. Yes.

Mr. Cheney: I object. The record speaks for itself, and not try to read an inadmissible document into the record. [71]

The Court: You can't decide a case of this kind by just having the bare record. Some explanation is needed. Both sides feel free to explain as they go along in presenting the case. You gentlemen having been thinking of this case for a long time and its hard enough to keep up with you with explanations let alone without explanation.

Mr. Winter: My purpose is to explain the difference in the security numbers and tying up the exhibits while the witness is here.

Q. Now, referring to the letter of transmissal dated April 25, 1935, and the proposed Defendant's Exhibit 'A' of April 25, do they, or not, both cover five thousand shares of Sunshine Mining Company stock?

A. Yes, they do, which was received from the Yakima First National Bank.

Q. However, the receipt shows the number certificate 424 and the Exhibit 29 shows Wn215.

A. Yes.

Q. The same explanation with regard to putting it into the street name before transmissal.

(Testimony of Howard Nimmons.)

A. Yes.

Q. Now, with respect to the second receipt shown on defendant's proposed exhibit 'A', receipt dated April 23, 1935, where the letter of transmissal is dated April 24.

A. That would be possible in as much as the stock in transmissal was probably delayed a day.

Q. Does Exhibit 29 show the same information as to who it was received from, the number of shares, except the difference in certificate number as you previously [72] explained?

A. Yes.

Q. You don't keep the original receipts—they are given to the person from whom you receive the stock.

A. Yes.

Q. You keep a copy of the receipt.

A. Yes.

Q. Do you know where they are?

A. They were in the Yakima office.

Q. You don't know other than that.

A. No.

Re Direct Examination

By Mr. Cheney:

Q. You have no personal knowledge of whether any receipt was given in Yakima to anybody on the shares of stock in front of you in that exhibit.

A. Only by what the receipts show on them.

Q. You have no knowledge whether or not, if there was a receipt, whether it is even in existence or not, of your own knowledge.

(Testimony of Howard Nimmons.)

A. That's true.

Q. What you have testified to is this—that was the practice and should have been followed in Yakima.

A. Yes, that is all I can say.

Q. You were in Seattle.

A. Yes.

Q. Now as to whether or not the identification Mr. Winter had in his hand and the exhibit you have in front of you are similar or not—you are limited as to what [73] appears on the face of the two exhibits.

A. Yes sir.

Q. You have no knowledge at all other than what appears on there.

A. That's right.

Q. Now, identification '32' is what?

A. These are copies of the sales invoices of the Sunshine Mining Stock sold by the Yakima First National Bank.

Q. Sold by you, or Drumheller, Erlichman & White—sold by whom?

A. Sold by the Yakima First National Bank to or thru Drumheller, Erlichman and White—that's just my way of stating it—from the period of April 23, 1935, to April 26, 1935.

Q. Those are the regular receipts kept by Drumheller, Ehrlichman & White in the ordinary course of business?

Mr. Winter: He said copies of receipts.

Witness: These are not copies of receipts—these are copies of invoices.

Q. Made in the ordinary course of business?

A. Yes.

(Testimony of Howard Nimmons.)

Q. The copies you have in your hands are the copies kept by Drumheller, Erlichman & White in the regular course of business. A. Yes.

Q. And constitutes your record upon that original transaction. A. Yes. [74]

Mr. Cheney: I offer this in evidence. It ties into exhibit '29' by giving the price per share of each sale as it went along.

Mr. Winter: Voir dire.

Q. What does 'as agent' mean on the proposed exhibit, if you know?

A. We were acting as agents—we didn't act as principal. In other words, we were just the broker in the action, we acted as agent in the transaction.

Q. Now, if I understand you correctly these are copies of—— A. Of the original invoices.

Q. Billed to the Yakima First National Bank——

A. Yes.

Q. For purchases by you or thru you.

A. These are the sales figures.

Q. Does that cover all of the Sunshine Mining Company sales——

The Court: From April 23rd to April 26.

Q. They don't cover any sales prior to April 23rd or after April 26th?

A. No, these are the posting media for posting accounts.

Q. When they are posted in the ledger sheet then these are destroyed?

A. No, they are filed away for a period of time.

(Testimony of Howard Nimmons.)

Q. Have you other copies of Exhibit '32' covering other periods?

A. No, I don't have them with me. [75]

Q. On each sale of stock for the Yakima First National Bank there would be a similar sheet invoice made out, would there? A. Yes.

Q. No different than this you have here covering the other periods.

A. I would want to examine them to say definitely. These are the only ones I examined.

Q. But it is the usual custom.

A. That would be the practice, yes.

Q. You know no reason why it wouldn't be the same. A. No.

Q. I think you did say that an invoice would be made for each one of the transactions shown on exhibit 29.

A. Yes, for each purchase and each sale.

Q. An invoice similar to what has been marked identification '32'? A. Yes.

Mr. Winter: If the Court please I object to the introduction of exhibit '32' on the ground it doesn't contain all of the sales tied up with Exhibit 29. I think we are entitled to all of them.

The Court: You have a right to get whatever records you want—one side can pick out some record and the other side pick out others. If it is important why can't you ask him to get together tomorrow the others you want and fetch them over—

Mr. Winter: I think in view of his testimony there were similar records—— [76]

(Testimony of Howard Nimmons.)

The Court: The figures are all on '29'—it may be admitted.

Plaintiff's identification '32' (invoice of sales for Y.F.N.B. by Drumheller, et al.) admitted in evidence and becomes Plaintiff's Exhibit '32'.

[Printer's Note: Plaintiff's Exhibit No. 32 is set out at page 417 of this printed record.]

Mr. Winter: Of course the bank has the original of these. They are objectionable on the further ground they are not the best evidence—the bank has the originals.

The Court: That doesn't necessarily make them objectionable. These are merely supporting documents of the ledger sheets there.

Mr. Cheney: That is all for this witness. So far as I am concerned he may be excused.

Witness Excused.

H. F. CRAWFORD,

a witness called for and on behalf of the plaintiff, having been duly sworn, testified as follows:

Direct Examination

By Mr. Cheney:

Q. Your name is H. F. Crawford?

A. Yes sir.

Q. Where do you live?

A. In Yakima.

(Testimony of H. F. Crawford.)

Q. How long have you been in Yakima?

A. Thirty years.

Q. What is your present occupation?

A. Banking.

Q. With what concern?

A. The National Bank of Commerce. [77]

Q. In what position? A. Assistant cashier.

Q. In 1934 were you connected with the Yakima First National Bank? A. Yes, I was.

Q. In what capacity? A. Cashier.

Q. I hand you plaintiff's Exhibit 19 and will ask you if the signature in the lower right hand corner is your signature? A. Yes, it is.

Q. Will you state, Mr. Crawford, as to when and where you signed that Exhibit '19'.

A. To the best of my recollection it was signed on or approximately on the date the letter was written.

Q. What date is that?

A. December 12, 1934.

Q. Where was it signed by you?

A. At the office of the Yakima First National Bank.

Q. In Yakima, Washington?

A. In Yakima.

Q. Who brought the letter to you to have you sign it for the bank?

A. Mr. Hardy, the president at that time and Mr. Bradshaw, as I recall it, accompanied him—they were both present.

(Testimony of H. F. Crawford.)

Q. You are referring to R. M. Hardy?

A. Yes.

Q. Who was president of the Yakima First National Bank. A. Yes.

Q. And Mr. Bradshaw was the other gentleman who signed [78] the same letter. A. Yes sir.

Mr. Cheney: You may examine.

Cross Examination

By Mr. Winter:

Q. What connection did you have with the Yakima Holding Company? A. No connection.

Q. Did you own any stock in the Yakima Holding Company? A. Yes, at that time I did.

Q. You were not an officer of the company?

A. No.

Q. Were you a director? A. No sir.

Q. You were cashier of the Yakima First National Bank, is that right? A. Yes.

Q. The Yakima Holding Company owned substantially all of the stock of the bank at that time?

A. Yes.

Q. As a matter of fact 4800 shares out of five thousand. A. That is approximately correct.

Q. Mr. Hardy was president of the Yakima First National Bank and also president of the Yakima Holding Corporation. A. Yes sir.

Q. Mr. Bradshaw was an officer of the bank, was he? A. I think not—he was a director.

Q. Officer of the bank and secretary of the Yakima Holding Company. [79] A. Yes sir.

(Testimony of H. F. Crawford.)

Q. When you say to the best of your recollection you signed the letter about the date it bears, are you in the habit of signing letters on some other date than the date it bears?

A. Not my customary practice, no.

Q. Did you receive the letter in the mail or was it handed to you?

A. I stated I believe it was handed to me by Mr. R. M. Hardy, the president.

Q. And Mr. Hardy told you to sign it?

A. He asked me to sign it.

Q. There was no further discussion about it?

A. After having read the document I signed it.

Q. You just signed it then what did you do with it? A. I handed it back to Mr. Hardy.

Q. Where was the bank—next door to the Holding Company? A. Yes.

Q. Did Mr. Hardy bring you any other document to sign at that time? A. No sir.

Q. Was it customary for Mr. Hardy to bring you documents and tell you to sign them?

A. Occasionally during transaction of bank business.

Q. Yours wasn't to ask how or why, is that right?

A. Well, I had knowledge——

Q. You had knowledge of it but you didn't ask or question the transaction? A. No. [80]

Q. You didn't have anything to do with the transaction.

A. I was not instrumental in its performance.

(Testimony of H. F. Crawford.)

Q. After the transaction was completed there was nothing in the records of the Yakima National Bank to show that the bank owned the stock, was there? A. No.

Q. And never has been there.

A. I think not.

Q. Were you with the Yakima First National Bank when its assets were sold or when its business—banking business was sold?

Mr. Cheney: Object to that as not proper cross examination.

The Court: It is improper cross examination.

Q. I think you stated to the best of your recollection it was signed about that date—do you have any independent recollection of the transaction?

A. Something with which to identify the date you mean?

Q. Yes. A. No, I don't.

Q. When was the substance of the letter first brought to your attention—at that time?

A. No, I had knowledge of its proposed carrying out of those plans and program.

Q. How long before?

A. I don't know. Several weeks I would say. It had been discussed by the directors and officers.

Q. Can you say of your own knowledge the letter was dated upon that date, or in 1935—I don't want you to [81] refresh your recollection or refer to the letter—you say you have an independent recollection about it.

(Testimony of H. F. Crawford.)

A. If I had signed that letter on a date far removed from the date indicated I would have noted on the letter the date of my having signed the same.

Q. That's all you have to say about when you know you signed the letter—is by what it shows?

A. Except as I say——

Q. That is all you know——

Mr. Cheney: I submit the witness has a right to finish his answer.

A. Except as I say had the date been far removed from December 12, 1934, I would have made a notation on it regarding the date.

Q. You don't know, as a matter of fact, it was dated at all when you signed it, do you?

A. Except for the fact its customary to date a letter.

Q. You are just basing it on the fact its customary to date a letter. A. Yes.

Q. You don't recall of your own independent recollection that it was dated.

A. Of the thousands of letters I signed I don't suppose I could tell you what were dated and what were not.

Q. You couldn't state to this Court of your own knowledge that this letter was dated when you signed it, could you? [82]

A. I don't believe there was any variation——

Q. You don't know of your own knowledge it was dated at the time you signed it?

(Testimony of H. F. Crawford.)

A. I believe it was dated.

Q. Well, do you know it, Mr. Crawford?

A. Yes, I believe it was.

The Court: You were not an officer of the Holding Company?

A. No sir.

Q. Mr. Hardy was president of the bank and president of the Holding Company?

A. That's correct.

Q. Who was vice president of the bank?

A. Mr. Alex Miller, I believe.

Q. Was he connected with the Holding Company? A. Yes.

Q. What was his connection with the holding company?

A. Director, as I recall it.

Q. Who was cashier of the bank?

A. I was cashier of the bank.

Q. Was there more than one vice-president in the bank?

A. Yes, Mr. L. R. Rightmire was vice president.

Q. Was he connected with the Holding Company? A. Not as an officer.

Q. As a director?

A. I believe he was a director.

Q. You were the only officer of the bank that was not an officer of the Holding Company?

A. That is correct. Well, there were other junior [83] officers.

(Testimony of H. F. Crawford.)

Re-Direct Examination

By Mr. Cheney:

Q. I will put the question this way: looking back in your memory as to about the time that Mr. Hardy and Mr. Rightmire came to see you to have the letter signed reciting the details of the transaction between the Yakima First National Bank and the Yakima Holding Corporation—what would be your recollection as to the time of year and the year in which that was?

Mr. Winter: I object on the ground it is improper redirect examination. The witness didn't testify as to Mr. Rightmire.

Mr. Cheney: I mean Mr. Bradshaw and Mr. Hardy.

Mr. Winter: Its not proper redirect examination.

The Court: He testified on direct examination it was signed that day, the 12th day of December. I think on re-direct he is entitled to go into the matter further. Objection overruled.

A. I believe it was several weeks prior to the time I signed this letter.

Q. What is your independent recollection what time of year was it you signed the letter and what year? A. In December of 1934.

Q. Do you know approximately the time the Sunshine stock had been listed for sale on the stock market? A. I don't recall the date.

Q. You remember the occasion?

(Testimony of H. F. Crawford.)

A. Oh, yes. [84]

Q. When in your recollection did that occur—in what year?

Mr. Winter: That is objected to——

Mr. Cheney: I'll withdraw the question.

Re-Cross Examination

By Mr. Winter:

Q. You say your best recollection is it was signed in December, 1934. A. '34.

Q. How long before the bank sold its assets would you say it was before—how long before the bank sold its business would you say it was you signed the letter?

A. About six months, I believe.

Q. Six months? A. Approximately.

Q. When did the bank sell its business?

A. In 1935.

Q. It was shortly before the bank sold its business you signed the letter?

A. Approximately six months.

Q. Do you know when the bank went into liquidation?

A. No, I don't recall the date.

Q. You left the bank and went with the National Bank of Commerce? A. Yes.

Q. When did you go to work for the National Bank of Commerce?

A. It was in June of 1935.

Mr. Winter: That's all.

(Witness excused.) [85]

Mr. Cheney: At this time I would like to offer Exhibit "19" in evidence unlimited, and not limited as your Honor did at first. Your Honor said there was a question of date and now I ask that it be admitted generally, unlimited.

Mr. Winter: I object on the ground it isn't shown to have been signed and dated on the date it now bears. The witness testified he had no independent recollection but thinks it must have been signed——

The Court: There never would be a letter admissible in the world if that was any argument worth while. I will overrule the objection. It insults the intelligence of the Court to make an argument like that. If you ask me if I signed a certain letter on a certain date several years ago, I couldn't say. We have to have some reliance on people when they say they think it was signed on such and such a date.

(Whereupon Court adjourned to convene at 9 A.M. the following morning, at which time, all parties present the trial proceeded at follows:)

Mr. Winter: I would like to make a demand in open Court on Mr. Funk to produce those receipts as liquidator of the Yakima First National Bank, a part of his records, of which Government's Exhibit "A" is a photostatic copy.

Mr. Cheney: In the very short period of time we have, we will attempt to do it.

(The above demand by Mr. Winter was made just [86] immediately following the Court's announcement of adjournment and preceding the Bailiff's formal announcement of same. Reporter.)

ROBERT M. HARDY,

a witness called for and on behalf of the plaintiff,
having been duly sworn, testified as follows:

Direct Examination

By Mr. Cheney:

Q. Mr. Hardy, you reside in Yakima?

A. Yes sir.

Q. What is your present occupation?

A. President of the Sunshine Mining Company.

Q. And do you have any present official connection with either the Yakima First National Bank or the Yakima Holding Company?

A. The Board of Directors of the Yakima First National Bank have been connected as a kind of advisory committee of the liquidator, or to the liquidator, I should say.

Q. And you are a member of that Board of Directors?

A. That's right.

Q. And I suppose you have continued as a sort of ex-officio president of that board of directors?

A. Well, I really acted as chairman when I was here. I don't think I attended but one meeting this

(Testimony of Robert M. Hardy.)

last year. I don't know how many they had, I have been out of town.

Q. In addition to the Sunshine Mining Company are you familiar or connected with the Bank of Commerce? [87]

A. Director of the National Bank of Commerce in Seattle.

Q. Now, going back to the year 1934, in August of that year, were you connected with the Yakima Holding Company? A. Yes sir.

Q. In what capacity were you connected with it?

A. President and director and member of the executive committee.

Q. Now, can you tell us who were the other officers of the Yakima Holding Company?

A. Mr. Alex Miller was vice president—Mr. George H. Bradshaw was secretary and Mr. A. E. Larson was before his death was treasurer.

Q. Who succeeded Mr. Larson as treasurer?

A. I don't remember that.

Q. Who were the executive officers of the Yakima First National Bank?

A. I was president of the Yakima First National Bank, Alex Miller, Mr. A. E. Larsen, Mr. L. R. Rightmire, and Mr. Joe L. Clift were vice presidents, Mr. Crawford was cashier. Mr. Bradshaw wasn't connected with the bank as an officer—he was director and member of the executive committee.

Q. Mr. Larson died in June, 1934?

(Testimony of Robert M. Hardy.)

A. That's correct.

Q. Now, in August, 1934, did the Yakima First National Bank take any action in reference to acquiring, purchasing or otherwise, dealing with Sunshine Mining Company stock? A. They did.

Q. What was that action? [88]

A. They purchased 7500 shares of Sunshine Mining Company stock.

Q. Now, who handled the transaction and how was the transaction handled?

A. There were two transactionss, one was the purchase of five thousand shares, the other was the purchase of 2500 shares. The purchase of the five thousand shares was purchased from Grande Stolle & Company.

Q. Just so the record will be clear, Alex Miller had executed a contract to sell ten thousand shares to Grande Stolle. A. That is correct.

Q. And the bank purchased five thousand shares from Grande Stolle. A. That is correct.

Q. Was the five thousand shares they purchased from Grande Stolle the five thousand they had contracted from Alex Miller? A. That is correct.

Q. And stock certificate No. 69 for five thousand shares transferred to the name of Yakima National Bank, is that the five thousand shares that was bought from Grande Stolle? (Exhibit "5".)

A. That is the certificate, being certificate Wn 69.

Q. Now, just a little further on that five thous-

(Testimony of Robert M. Hardy.)

and transaction, Mr. Hardy, who represented the bank in making that purchase? A. I did. [89]

Q. The price was how much?

A. Eight dollars.

Q. How as the transaction handled—who was buying it and paying for it in August?

A. The money was furnished by the Yakima Holding Corporation which, in reality, was borrowed from the bank.

Q. What do mean by “in reality”—was it a part of the transaction?

A. Yes, I might explain, about that time the Yakima Holding Company came into some funds. They had a loan of the bank which they naturally would pay off but they really sold this stock so the transaction could be handled.

Mr. Cheney: I don't know if that is very clear. To bring that to a specific head—on or about August 17, 1934, you personally paid to the Holding Company the sum of \$75,000.

A. That's correct.

Q. You paid back a loan that you, yourself owed?

A. That's correct.

Q. And at that same time the Holding Company was indebted to the bank in an amount approximately \$60,000?

A. My recollection is \$50,000.

The Court: The forty thousand they got from the sale of this stock came from your personal loan?

A. Yes.

(Testimony of Robert M. Hardy.)

Q. (Mr. Cheney) Now, in reference to the 2500 shares of stock that was also bought on or about the [90] same time—how was that transaction handled?

A. Mr. Bradshaw was authorized to purchase that on the open market.

Q. Now, Mr. Hardy, in whose—

The Court: Mr. Bradshaw was Secretary of the Holding Company. A. That's correct.

Mr. Cheney: Q. He was authorized to buy that stock by whom?

A. By the executive committee.

Q. Of—

A. The Yakima First National Bank.

Q. Now, at the time that stock was purchased, both the 2500 and the 5000 shares, what agreement, or understanding was there existing between the Yakima First National Bank and the Yakima Holding Corporation in reference to how the stock was to be handled, cared for or kept—

Mr. Winter: We will object to that question as not the best evidence. If there was such an agreement and it was in writing we want to know.

The Court: Sustained.

Q. Was there any written agreement made in August?

A. There was no written agreement made as to the 7500 shares in August.

Q. What was the agreement between the bank and the holding company in August?

Mr. Winter: Who was present—

(Testimony of Robert M. Hardy.)

Mr. Cheney: He said the executive committee. [91]

Mr. Winter: If the executive committee kept minutes we think the minutes are the best evidence. Are there any minutes of the executive committee?

Mr. Cheney: There are no minutes.

Mr. Winter: Let's find out who was present——

The Court: That isn't a matter going to the admissibility of the evidence. That is a matter you can bring out on cross examination.

Question Read: "What was the agreement between the bank and the holding company in August?"

A. Well, the stock was in my possession—our agreement as to losses, if there was a loss, it was to be the bank's loss. The Holding Company was to get the dividends on the stock while it was being held. The Sunshine Mining Company was paying pretty good dividends, and they did receive those dividends.

Q. Was there any discussion at that time as to probably or possibly there might be a write up in addition to that?

A. Yes. Nothing was said at that time as what that would be, but the holding company would get a write up on the stock for having—loaning us the money.

Mr. Cheney: 'Plaintiff's identification "33" is the same ledger that was introduced in evidence yesterday as Exhibit "12", and I am marking a spe-

(Testimony of Robert M. Hardy.)

cific page of notes payable to the bank showing the indebtedness of the Holding Company to the bank.

We offer identification "33".

Mr. Winter: No objection. [92]

[Printer's Note: Plaintiff's Exhibit No. 33 is set out at page 436 of this printed record.]

Mr. Cheney: The Bills Payable show that in August the indebtedness of the Holding Company to the Bank was somewhere between the figures of \$59,000 and \$50,000——

Mr. Winter: It should also be pointed out to the Court the account was not paid until September, 1935, and further call your Honor's attention there has been carried a further debt of \$60,000, notes payable, prior to 1932——

Mr. Cheney: I think Counsel can't read very well. The account was closed out in June, 1935, and re-loans were made——

Mr. Winter: I say the account was still sixty thousand dollars in September.

Mr. Cheney: I may state the interest was paid by the Holding Company to the bank upon the indebtedness.

Q. Mr. Hardy, in approximately 1930 there had been a consolidation of the Yakima National Bank and the First National Bank which was called the Yakima First National Bank. A. Yes sir.

Q. Now, at that time, what was the financial situation of the First National Bank of Yakima?

A. Well, I was told by the Receiver—the Na-

(Testimony of Robert M. Hardy.)

tional Bank Examiner—that unless something was done about it we would have to be closed, and he urged us to take over the bank.

Q. In the process of consolidation did the Yakima First National Bank take into its assets some considerable questionable securities? [93]

A. That is correct.

The Court: Which bank were you with?

A. The Yakima National Bank and they wanted us to do something about the First National Bank.

Q. When he was talking to you he was talking about the First National?

A. Yes, that was Mr. Harris at San Francisco.

Mr. Cheney: Q. And prior to this consolidation when you absorbed the First National, and then became the Yakima First National Bank, was Mr. Alex Miller an officer or director of the Yakima National Bank? A. No sir.

Q. Was he an officer or director or stock holder of the First National Bank?

A. He was a director, and I believe vice president.

Q. And had stock in it?

A. Yes. One of the large stockholders.

Q. Now, at the time of the consolidation was the Yakima First National Bank given any assurance by the National Banking Department as to how long the Department would give the new consolidation to work out the questionable assets taken over by them?

(Testimony of Robert M. Hardy.)

A. We were very definitely told we could have five years to work it out.

Q. Now, after the consolidation was made what attitude did the banking department then take?

A. Unfortunately Mr. Harris died and they got a new chief national bank examiner and they began to [94] pour on the heat to clean things up.

Q. Was there some pressure upon you to have the Yakima First National Bank enter into a preferred stock arrangement with the Reconstruction Finance Corporation?

A. Very definitely.

Q. How much?

A. Two Hundred Thousand Dollars they wanted us to take, and I think I was communicated with at least every two weeks about, usually by long distance phone.

The Court: Mr. Harris died in 1933?

A. I don't just remember but it was somewhere in that picture. Mr. Cook back there can probably tell you but it was somewhere in '33. In fact, Mr. Cheney, we finally made application for that \$200,000 and the application was granted.

Q. Did you, as president of the bank, and the bank itself, desire to take on the preferred stock arrangement?

A. No sir, the directors were uniformly opposed to it.

Q. What was the inciting cause of the bank buying the original 7500 shares of stock?

A. It was the suggestion, first, of Mr. Alex Miller.

(Testimony of Robert M. Hardy.)

Q. Now, after that did the bank make any effort to buy other shares of stock?

A. Yes, it was decided, and really proposed by Mr. Miller, that we would try to get thirty thousand shares.

Q. Of what? A. The option stock.

Q. Now, these options of stock, explain briefly [95] to the record—referring to options of stock in 1934.

A. Grande Stolle & Company, working through a New York firm, that is, they were to handle the listing, proposed to the Sunshine Mining Company and its stockholders that they would list the stock on the New York Stock Exchange, pay all the expenses, provided they could get options on Sunshine stock and forty thousand shares of what they called “contract stock”—they contracted to buy this by payments along through the time, and the prices were definite—that contract stock which they took—pardon me—that contract stock was \$5.82½, and the option stock which they took an option on until December 12, 1934, was at a price of \$6.90.

Q. And they contracted, options and contracts of approximately how much of Sunshine stock?

A. It was in excess of two hundred thousand shares.

Q. After the Board of Directors decided to obtain options on thirty thousand shares of stock of Grande Stolle, did you attempt to secure that stock?

A. Just one correction—it was the executive

(Testimony of Robert M. Hardy.)

committee that authorized this. Yes I did. I took it up with Mr. Stolle and he took it up with their New York connections.

Q. Were you able to get the stock on that basis?

A. No sir.

Q. Now after that was there another transaction initiated for the bank to buy some more Sunshine stock?

A. There was in December. It run along through November and finally culminated in December. [96]

Q. What was that transaction?

A. That was a transaction with Mr. Alex Miller.

The Court: You say you couldn't get any, and wanted to get some thirty thousand—didn't this 5000 come out of these \$5.32 options?

A. They did not in this way—we purchased five thousand shares outside—what we were attempting to do was to get an assignment thereof and pay them the difference between what they were paying for it and the market price.

Mr. Cheney: Q. The attempt to get the thirty thousand was after you bought the five thousand.

A. Yes, my recollection is the five thousand was bought in August, and it was around in October we were attempting to get the thirty thousand.

Q. Now, let's come down to the transaction with Alex Miller, the initiation of that in November 1934—how was that transaction commenced?

A. Well, Mr. Miller felt quite an obligation to the Yakima First National Bank because he had——

(Testimony of Robert M. Hardy.)

Mr. Winter: I object to the witness——

Objection sustained.

Q. Just go ahead and tell what Mr. Miller did at that time.

A. Well, any way he wanted to get the bank in better shape and offered to trade five thousand shares——

Mr. Winter: I object to what he offered because the offer is already in evidence.

Q. Prior to the time the trade transaction arose [97] was there a sale—or sale negotiations with Mr. Miller or by Mr. Miller with the bank?

Mr. Winter: We submit if there is a document on file, a written agreement, the agreement is the best evidence of what was done—he is asking for conversations with a deceased person.

The Court: There is only one theory on which I allowed a lot of this to go in evidence here. You have a fraud penalty involved, and upon that basis I let the documents go in, some of them. It shouldn't properly go in but I will permit the testimony to go in on that basis.

A. Well, we had this deal with him to trade some Holding Corporation stock for Sunshine Mining Company stock.

Q. At the beginning of this trade transaction, was it a trade or a sale that Mr. Miller was talking about?

A. Well, at the time, yes, it was a sale, but then we worked it out the other way.

(Testimony of Robert M. Hardy.)

Q. Explain why, please, you worked it out the other way?

A. Well, at that time, he thought the Larson estate should also help out on getting the bank in better shape, and I contacted them and tried to get them to put in some stock, and I didn't have any luck with them—I don't know if that is what you refer to, or not, but that was the facts——

Q. The exhibits in the record show that some time in December this transaction was put through as a trade arrangement. [98]

A. That's correct.

Q. Now how did it start—as a trade or sale?

A. It started as a sale to begin with.

Q. Explain what happened—as to what transpired between the bank and Mr. Miller leading up to this trade transaction.

A. I thought I just explained that he thought others who were stockholders in the bank, and large stockholders of Sunshine Mining Company should put in some stock at a low price.

Q. Put the stock in where?

A. At the bank. Well, since we couldn't get the others in Mr. Miller wanted to make this trade. He offered to do it and it was consummated.

Q. Just look at Exhibits 16, 17 and 18, for a minute, Mr. Hardy, before I ask you about them.

A. Yes sir.

Q. Now the letter, Exhibit "18" is a letter to the Guaranty Trust Company.

A. Yes sir.

Q. I note that that letter recites he was deliver-

(Testimony of Robert M. Hardy.)

ing to the Guaranty Trust Company certificates for five thousand shares of stock, in exchange for four thousand shares of Yakima Holding Company stock.

A. Yes sir.

Q. After the delivery of the stock to the Guaranty Trust Company and after writing this letter what transpired between you and Mr. Miller, the bank and Mr. Miller, in reference to that transaction? [99]

A. After I was unable to get the Larson estate in Mr. Miller told me he was leaving for California—he would go through with the trade anyway whether anybody else came in or not.

Q. That was approximately how long after December 11, the date of this letter?

Mr. Winter: I didn't object to the last question on the theory your honor announced. We believe the contract, the written agreement is the best evidence and just relating the conversation—no time and place being given—by a deceased person—I realize under your Honor's former ruling—I didn't make an objection I thought your Honor would probably receive it because of the fraud issue here involved.

The Court: What was the relationship between the Guaranty Trust Company at that time and——

Mr. Winter: That was a subsidiary of the Yakima Holding Company. The Yakima Holding Company and its officers were right together——

Mr. Witness: I beg to differ with you. They owned a control of it.

(Testimony of Robert M. Hardy.)

The Court: What did the Guaranty Trust Company do—did it operate a regular trust business?

Witness: Yes, operated a regular trust business.

Mr. Winter: Handling stock in escrow?

Witness: Yes, conducted a general trust business.

The Court: This testimony, as I understand it, Mr. Miller made a conditional offer. [100]

Mr. Winter: To deliver to the Guaranty Trust Company a certificate for five thousand shares. The testimony shows Mr. Miller's stock wasn't transferred until May 1st, 1935, by the Guaranty Trust Company—as a matter of fact the evidence will show that other stock was delivered to the bank for sending to Drumheller, Ehrlichman and White for sale because they didn't have the delivered stock at that time, it was still in escrow.

The Court: The purpose of this testimony is to show why the Miller transaction was different from that condition, is that right?

Mr. Cheney: Certainly, your Honor.

Mr. Winter: I take it that is the purpose. You are relying on this other agreement set forth in these other letters which we saw for the first time yesterday, both dated the same date. One is to Alex Miller by Mr. Bradshaw and the other to Mr. Bradshaw by Mr. Miller.

The Court: I think under the same theory I will admit it. It doesn't affect the legal effects, but they have a right to show why this was waived later, so we go into the question of whether there was

(Testimony of Robert M. Hardy.)

fraud involved. For the present I will admit it for that purpose only.

Q. Approximately how soon after the letter of December 11, 1934, would you say you had your transaction with Mr. Miller with reference to waiving the condition?

A. It was within the next few days, not longer than a week. The reason I remember that specifically Mr. Miller was trying to get away to California and wanted [101] to get there before Christmas.

Q. Mr. Hardy, I hand you defendant's—I mean plaintiff's exhibit "19". I will ask you if you saw that letter on or before the time it was written?

A. I did.

Q. Just state, Mr. Hardy, what your knowledge was of the letter, the time and date and place it was written and delivered.

A. Well, when this proposal of Mr. Miller's was brought up we decided we had better have something about it in writing, and we had some discussion as to who should sign it for the bank, and finally decided that Mr. Crawford should because he had nothing to do with the Holding Company. The letter was written by Mr. Bradshaw and presented to Mr. Rightmire and myself, and after going over the letter I think I took it to Mr. Crawford. I don't know whether Mr. Rightmire was with me, or not. After he read it over I told him that was our agreement and he signed it.

Q. Does that letter both in reference to the 7500

(Testimony of Robert M. Hardy.)

shares and in reference to the five thousand shares correctly and exactly reflect the agreement entered into between the Yakima Holding Corporation and the Yakima First National Bank in August and December, 1934? A. It certainly does.

Q. Was that letter written, signed and executed and delivered on or about the date it bears, to-wit, December 12, 1934? A. It was [102]

Q. Now in the spring of 1935 did somebody decide to sell the Sunshine stock?

A. Yes, we decided to sell it.

Q. By 'we' who do you mean?

A. Mr. Rightmire, Mr. Bradshaw and myself.

Q. Constituting what?

A. The executive committee.

Q. Of what?

Mr. Winter: If the Court please, I think Counsel is leading Mr. Hardy enough.

The Court: Your questions are very leading.

Witness: The executive committee of the First National Bank consisting of Rightmire and Mr. Bradshaw and myself.

Q. Who handled the deal? A. I did.

Q. Now was the stock delivered? Who delivered the stock to who?

A. I delivered it to Mr. Ross Spencer of Drumheller, Ehrlichman & White.

Q. Now I notice from the exhibits that the property was receipted by them, according to this exhibit, as property of the Yakima First National Bank. When this property was delivered to Drum-

(Testimony of Robert M. Hardy.)

heller, Ehrlichman and White for sale which corporation delivered the stock to them?

A. The Yakima First National Bank.

Q. Why did the Yakima First National Bank deliver it to them for sale?

A. Because it was their property. [103]

Q. And in handling the sale were any instructions given to Drumheller, Ehrlichman and White in writing or orally at what price or when to sell?

A. No—I was constantly during the time we were making the sale in telephonically in communication with Mr. Spencer and telling him to sell 100, or 200, or 300 at certain prices.

Q. The sale orders were actually given after you delivered the stock to them.

A. Yes, that is correct. I think we sold some of the stock the same day it was delivered them—but am not sure about that. As we went along I kept raising the price I remember that.

Q. Now when the sale price was received from the proceeds of the sale, do you know who received the money at the bank.

A. The bank received the money or paid the Holding Company what they had in it, the purchase price.

Mr. Cheney: You may examine.

Cross Examination

By Mr. Winter:

Q. When you delivered that stock to Drum-

(Testimony of Robert M. Hardy.)

heller, Ehrlichman and White did you receive receipts at that time?

A. Yes, I guess we did.

Mr. Winter: To Mr. Cheney: Do you have those original receipts?

Mr. Cheney: We were unable in the short time we had to find them, and I was busy myself—we may be able to find some place. [104]

Q. I show you what is marked for identification Defendant's Exhibit 'A'—would you say those are photostat copies of the receipts you received?

A. I couldn't tell you.

Q. Do you know Mr. Spencer's signature?

A. It looks like Ross Spencer's signature.

Q. You did receive receipts. A. Yes sir.

Q. And you delivered certificate No. 424 for 5000 shares.

A. We delivered five thousand shares and twenty-five hundred shares and five thousand shares.

Q. The exhibit I have shown you sets forth the exact number of shares? A. Yes sir.

Q. Those are copies of the receipts, aren't they, Mr. Hardy. Can't you testify those are copies of the receipts? A. No sir.

Q. But you did receive receipts. Did you make any notations on the receipts you received, Mr. Hardy?

A. No, I didn't make any notations.

Q. You will notice on receipt 6519 the words

(Testimony of Robert M. Hardy.)

'Yakima Holding Corporation'—is that in your hand writing?

A. That is exactly what I am looking at——

Q. Is that your hand writing?

A. No, it is not.

Q. Do you know whose hand writing it is?

A. No sir, I do not.

Q. What did you do with the original receipts you [105] you received from Drumbheller, Ehrlichman and White? The original receipts when you delivered five thousand shares of Sunshine Mining stock, certificate 424; 2500 shares of stock Wn 226, 259 and 354 and five thousand shares Sunshine Mining stock, certificate No. Wn 69?

A. I always kept those receipts.

Q. Personally?

A. In this case I am sure I did. But I don't keep them forever. After the stock is sold and get our money I just destroy them.

Q. What did you do with the receipt after you received them?

A. I don't have any independent recollection of that. I probably kept them either in my desk or turned them over to Mr. Hoffman who was our Securities officer.

Q. The bank maintained a securities department in accordance with Government regulations?

A. Now sir, we did not.

Q. The bank, however, did sell stock for others——

(Testimony of Robert M. Hardy.)

The Court: Which receipt number of this exhibit is the one that has the handwriting on it?

Mr. Winter: Receipt No. 6519, your Honor.

Mr. Cheney: That refers to the 2500 shares.

Mr. Winter: The receipt dated April 16, 1938.

A. Yes, they did, in this way. If a customer of the bank brought some stock in we would send it off to the brokers.

Q. Well, you recall, do you not, you had a substantial number of sales just in respect to Sunshine Mining stock? [106]

A. That's true. You asked if we had a securities department. We had what we called a collection department and we handled these things thru the collection department.

Q. When the Yakima Holding Company turned over the stock to the bank you gave the Yakima Holding Company receipts, didn't you?

A. No sir, we did not.

Q. I show you what has been marked for identification Defendant's Exhibit 'B', and ask you whether or not those are copies of form of receipt which the bank used, do you know?

A. It looks like it, sir.

Q. Whose signature appears on that exhibit 'B'?

A. The man in charge of the collection department.

Q. What is that name?

A. F. B. Gleatzner.

(Testimony of Robert M. Hardy.)

Q. As a matter of fact you issued those receipts to all of your customers of the bank who delivered stock to you to be sold thru Drumheller, Erlichman and White.

A. Yes sir.

Q. Where were these receipts kept with the Yakima Holding Company?

A. They would have been kept by Mr. Bradshaw.

Q. Were they part of the records turned over to the liquidator?

A. Mr. Bradshaw was president and general manager of the Guaranty Trust—he kept his records in the Guaranty Trust Company.

Q. They would all be turned over at the same time, [107] would they—the Guaranty Trust Company still operates—I will withdraw both questions. The Guaranty Trust Company is still operating?

A. Yes sir.

Q. Where are the records of the Yakima Holding Company now, if you know?

A. I don't know where they are. Do you want me to guess?

Q. No, I just asked you if you knew.

A. I don't know.

Q. You were president of the Yakima Holding Company when it went into liquidation?

A. Mr. Bradshaw kept all the records of the Yakima Holding Company.

Q. Did you turn them over to Mr. Bradshaw?

A. He had them at that time.

(Testimony of Robert M. Hardy.)

Q. So far as you know he still has them, is that right?

A. The Guaranty Trust Company still has them.

Q. If you will notice in what has been marked for identification Defendant's Exhibit 'B' that it refers to the same certificate numbers set forth in—well, it has been marked Defendant's Exhibit 'A', certificate No. 334 shown in receipt No. 6519, certificate 259 shown in the same receipt and certificate number 226 shown in the same.

A. That's right.

Q. And the other refers to certificate No. Wn 69 for five thousand shares. [108]

Q. Is that the time the Holding Company turned over the stock to the bank?

A. Well, they might at that time have turned over physical possession of it.

Q. Who turned over the stock to the bank and received the receipts, did you?

A. No. It might have been me and it might have been Mr. Bradshaw.

Q. Do you recall whether you got the receipt from the bank or was that receipt given to Mr. Bradshaw?

A. If I had it I took it over to Mr. Hoffman and Mr. Glaetzner together with Mr. Spencer and there the transaction was completed.

Q. But don't you recall that the Holding Company did turn over the stock to the bank and receive a receipt for it?

(Testimony of Robert M. Hardy.)

A. In fact it went thru our collection department.

Q. And you handled numbers of transactions of Sunshine Mining Company stock thru your collection department, and other stock.

A. That's true.

Q. Then I take it you consider your collection department your securities department in a sense. They were handling that type of business for the bank, or for the convenience of customers.

A. You remember the bank couldn't have a securities department after 1933. It was a violation of the law to handle securities.

Q. You mean buying securities on the part of the bank [109] but after 1933 you could still get securities for customers.

A. We could sell for customers.

Q. And you were selling all the securities shown in exhibit 29 for customers.

A. Yes.

Q. And the Yakima Holding Company turned over 2500 shares and the bank handled that thru the same account, didn't they?

A. No, I wouldn't say that, because that was the property of the bank at that time—the transaction went thru the collection department and that's his records.

Q. In any event the Holding Company turned the stock over to the bank for sale to Drumheller, Ehrlichman and White.

A. If you can say a person turned over prop-

(Testimony of Robert M. Hardy.)

erty to some other in the bank and sold it. It was the property of the bank. That was Mr. Glaetzner's records of how he handled the matter. He had to have records of it. The moneys that came back were turned over to him in his department.

Q. Now you said a moment ago you didn't know whose hand writing this was on Exhibit 'A'—look at that writing on Exhibit 'A' and compare the writing—the words "Yakima Holding Corporation" with Mr. Glaetzner's writing with which you are familiar.

A. That looks like Mr. Glaetzner's writing.

Q. You don't know when that notation was made? A. No, I don't.

Q. The Yakima Holding Company didn't have any account [110] with Drumheller, Ehrlichman and White, did they, to your knowledge as president of the Yakima Holding Company?

A. No sir. The Guaranty Trust Company had one.

Q. Now if the Yakima Holding Company did own stock in other corporations and it was about to sell it it would be natural for them to sell it thru the Yakima First National Bank—it was the thing to do, wasn't it?

Mr. Cheney: Object to that—not proper cross examination. The question must have some bearing on what has been testified to.

Objection overruled.

A. I would say no. Mr. Bradshaw handling all

(Testimony of Robert M. Hardy.)

the securities of the Holding Corporation would have handled them all thru the Guaranty Trust Company in his own account—in the Guaranty Trust.

Q. You were president of both companies. The Yakima Holding Company owned all the stock in both of them. A. No sir.

Q. Well, they owned more stock in the Yakima National Bank than they did in the Trust Company, didn't they?

A. I wasn't president of the Guaranty Trust Company.

Q. What connection did you have with it?

A. I was a member of the executive committee and member of the Board of Directors.

Q. Were you a large stock holder in the Guaranty Trust Company?

A. I held only qualifying shares as a director in the Guaranty Trust Company.

Q. I think you testified the Yakima Holding Company [111] was indebted to the bank some sixty thousand dollars about that time.

A. My recollection at that time it was fifty thousand dollars.

Q. It had also been indebted to the bank up to 1932 in some sixty thousand dollars.

A. That's correct.

Q. And they made loans and paid them off and made other loans. A. Correct.

(Testimony of Robert M. Hardy.)

Q. They were doing that all the time with the bank, weren't they? A. Correct.

Q. And finally liquidated your loan in 1935 when you sold the stock, didn't they?

A. That is correct.

Q. When you say it would have been natural for Mr. Bradshaw to have sold thru the Guaranty Trust Company, they were in the same office, were they not? A. No sir.

Q. The bank was next door to the trust company and so was the holding company.

A. That is correct. Next door, not the same office.

Q. There is a connecting door in between?

A. A connecting door to go down to the safe deposit department.

Q. You could get thru both office either entrance. A. That's right.

Q. When you say 'next door'—there are two entrances, [112] but still connect inside.

A. One owns one building and the other owns the other.

Q. Did the Yakima First National Bank handle sales of your personal stock thru their account with Drumheller, Ehrlichman and White?

A. Yes sir.

Q. Did they handle Mr. Bradshaw's personal account thru their account? A. No sir.

Q. Did they handle Mr. Alex Miller's?

A. Depending on what Mr. Miller wanted to do.

(Testimony of Robert M. Hardy.)

If there were some stuff he had over at the Guaranty Trust Company he would sell thru them.

Q. Didn't make a great deal of difference in the three companies as to who handled it, though.

A. If it had been Holding Corporation stock Mr. Bradshaw possessed he would have sold to the trust company he wouldn't brought it over to us.

Q. Now this stock is shown as being owned on the records of the Yakima Holding Company—carried in their stock ownership account, and—

A. I think you will find the stock speaks for itself.

Q. You know that as a fact.

A. I don't know that is true, no sir—very definitely I don't know that is true.

Q. You haven't seen any of the entries.

A. I have seen the records and I don't think they read that way. [113]

Q. I show you what has been marked for identification Exhibit '12'—in the general ledger—showing you inventory of stock Sunshine Mining Company—

A. It says right here Y.F.N.B. which means Yakima First National Bank.

Q. These are the books of the Yakima Holding Company. A. I couldn't swear to that—

Q. They are carried as stock owned by the Yakima Holding Company—

A. It says right there "YFNB"—

Q. You think that means it belongs to some one else. A. That's what I think.

(Testimony of Robert M. Hardy.)

Q. It's carried in your assets and you reported a dividend paid on it, didn't you?

A. Yes sir—we have a dividend agreement with the bank which has already been testified to.

Q. On your direct examination you testified you purchased 12,500 shares of stock, Sunshine Mining Company stock.

A. Yes sir.

Q. Now you purchased it in two lots, did you not?

A. I think more than that—I think you might call it three lots—5000, 2500, and 5000.

Q. Now you purchased on August 17 7,725 shares, is that correct?

A. Correct.

Q. Who did you purchase that thru?

A. Mr. Bradshaw handled that transaction, I think. [114] I am not positive of that.

Q. Then on August 17th you also purchased 5000 for \$40,000.

A. Yes, \$8 a share.

Q. Now that was purchased from the Grande Stolle Company.

A. Yes.

Q. Wasn't that also purchased from Frank Hardy, your brother?

A. He was interested with Stolle in that particular five thousand shares.

Q. Was that stock they received when they put the stock on the market—I mean bonus stock?

A. That's right.

Mr. Cheney: Bonus stock?

Witness: Contract stock.

(Testimony of Robert M. Hardy.)

Q. August 18 you purchased 800 shares for \$6320? A. That's what the ledger shows.

Q. That was also acquired by Mr. Bradshaw from outside sources. A. Yes sir.

Q. Then three days later August 21, you purchased 700 shares for \$5530.

A. Yes sir, that's what the ledger shows.

Q. Who was that acquired from if you know?

A. I think this whole transaction was handled with a Spokane broker—I am not positive of that.

Q. All right. Then there was purchased a total amount of that stock, \$59,576.50. [115]

A. That's what it shows.

Q. Now, that was all the stock you purchased in that transaction, wasn't it?

A. That's all the stock we paid cash for.

Q. Now, there is what I refer to as the second group is the 5000 shares which was acquired from Alex Miller. A. Yes sir.

Q. Mr. Miller exchanged five thousand shares of Sunshine Mining Company for four thousand shares of Yakima Holding Corporation in accordance with letter of December 11th, 1934.

A. Yes sir.

Q. And delivered that stock to the Guaranty Trust Company? A. Yes sir.

Q. The five thousand shares were held in escrow department of the Guaranty Trust Company, were they?

A. Yes, I don't remember how long——

(Testimony of Robert M. Hardy.)

Q. As a matter of fact——

Mr. Cheney: Let him finish his answer.

A. (Continuing) I might say they were taken out of the Guaranty Trust Company as soon as Mr. Miller released that \$200,000 proviso he had.

Q. As a matter of fact they were not transferred to the bank until May 1st, 1935.

A. It was not transferred to the bank—it went direct to Pocock.

Q. About May of 1935? A. No. [116]

Q. Was it April? A. April, wasn't it?

Q. Isn't it a fact you loaned five thousand shares of Sunshine Mining Company you delivered to Drumheller & White?

A. That would be impossible, sir, because I didn't own five thousand shares.

Q. Well, did Frank loan five thousand shares for sale until you got the certificate from Alex Miller? A. Not to my recollection sir.

Q. If that is a fact you don't recall it.

A. I don't believe it to be a fact, sir.

Q. When was the stock sold by Drumheller & White?

A. I know that was sold between April 23rd and the 30th of April.

Q. On January 6th, 1935, the Holding Company added on its books the sum of \$1875 to the cost of the 7500 shares with a mention "25c write up on stock"—was that the notation made on the Holding Company's books? A. Yes sir.

(Testimony of Robert M. Hardy.)

Q. You didn't make any write up charge to the five thousand shares you were to get from Alex Miller, did you?

A. That seems to be on the 7500 shares.

Q. You didn't make any write up on the five thousand shares, did you, Mr. Hardy, to the Holding Company?

A. No sir—we were paying \$12 for that——

Q. Don't volunteer anything. I asked you whether did and you said you had not—was that write-up [117] on the books of the Holding Company done pursuant to your personal instructions?

A. No sir, it was done pursuant to agreement of the executive committee, in accordance with our agreement they were entitled to a fee.

Q. The executive committee of whom?

A. Of the bank.

Q. Were any minutes made of the meeting of the executive committee?

A. There were *any* minutes of that transaction, sir.

Q. When do the records of the bank show any reference to that transaction?

A. When the money came in.

Q. In 1935? A. Right.

Q. Was there any record whatsoever, minutes, or otherwise, in the bank to indicate that they owned this stock prior to the time it was sold in 1935? A. No sir.

Q. I think you testified on direct examination

(Testimony of Robert M. Hardy.)

that prior to the trade with Mr. Alex Miller it was contemplated raising several hundred thousand dollars for the bank. A. That's right.

Q. It was also as set forth in this letter to raise money for the Yakima Holding Company, wasn't it, isn't that what Mr. Miller said in his letter?

A. Let me see the letter.

(Witness handed exhibit 18) [118]

Q. He says that was for the Yakima Holding Company, doesn't he—to provide money for the Yakima Holding Company.

A. Yes, but what he meant——

Q. Not what he meant—what he said.

A. I think its self evident it says that.

Q. As a matter of fact wasn't all of the cash to be raised based upon the fact they were going to have the Holding Company contribute capital to the bank? A. That is absolutely untrue.

Q. Then when Mr. Miller writes in his letter 'new money to be provided for the Yakima Holding Corporation' who owned five thousand shares of the bank, that was not a fact?

A. Mr. Miller was a man eighty two years old at that time. He knew it was the bank he was trying to put in good shape.

Q. Thats what I say—it was the Holding Company——

A. There never was any discussion of the Holding Company.

(Testimony of Robert M. Hardy.)

Q. And they issued their own stock—sold their own stock to Mr. Miller—

A. At a very good price—nobody on earth would have paid that price at that time.

Q. And received Sunshine Mining Company stock.

A. Yes sir—they got \$15 a share and there wasn't anybody would pay five dollars—in fact it was sold currently on the street for five dollars at that time——

Q. Mr. Miller offered to turn it in at fifteen dollars a share—— [119] A. That's correct.

Q. He was, in fact, contributing to the Holding Corporation \$10 a share.

A. That's exactly what he thought he was doing, making a contribution to the bank.

Q. By way of giving it to the Yakima Holding Corporation?

A. Giving it into the Holding Corporation when he knew the stock was the property of the bank.

Q. The stock of the bank was owned by the Holding Corporation——

A. Five thousand shares of the Sunshine stock was to come to the bank.

Q. Eventually——

A. And did come to the bank.

Q. Transferred in May, 1935. A. It was.

Q. What were your personal holdings in the stock of the Holding Company there?

A. I owned 7447 shares of stock in the Holding Company.

(Testimony of Robert M. Hardy.)

Q. How many shares are outstanding?

A. My recollection is around sixty five thousand shares.

Q. And you owned how many?

A. 7447 shares.

Q. In 1934?

A. Along about that time I bought some of the stock and I am not sure whether it was '34 or '35—it [120] wouldn't be a big amount, however.

Q. Did your brother own any stock?

A. No sir.

Q. You were the only member of the family owned stock—did your wife?

A. Nobody but myself owned stock.

Q. As I understand the Holding Company owned about 4800 of the 5000 shares of the bank stock.

A. Owned all the shares of stock of the Yakima First National Bank except the qualifying shares held by the Directors, which was ten shares apiece, and I have forgotten how many directors we had. They had an agreement with their directors, each one, that they would turn their stock in if they ever resigned from the Holding Company which, in effect, meant they owned 100%

Q. You were president of the Yakima Holding Company and also of the bank.

A. That is correct.

Q. Mr. Miller was vice president of the Holding Company.

A. Yes sir.

Q. Was he an officer of the bank?

(Testimony of Robert M. Hardy.)

A. Vice president of the bank.

Q. Vice president and director of the bank.

A. That's correct and member of the executive committee.

Q. Mr. Bradshaw was secretary of the Holding Company. A. Yes sir.

Q. His official office in the bank was director of the bank. [121]

A. And member of the executive committee.

Q. And Mr. Larson was treasurer of the Holding Company.

A. Before his death—and since the question was asked before I believed Mr. Clift was elected treasurer after that.

Q. Mr. Larson was also Secretary of the Bank.

A. We had no secretary.

Q. What office did Mr. Larson hold in the bank?

A. Vice president and director and member of the executive committee.

Q. Mr. Hardy, I think you testified about 1930 when the Yakima First National Bank was formed by the consolidation of these two other banks among the assets of, particularly, the First National Bank there were a lot of assets which were very doubtful, is that right? A. Correct.

Q. You had an understanding, or instructions from the National Bank Examiner Harris that you were to clean house, is that correct?

A. Mr. Harris definitely agreed with me he would give me five years to work those assets out.

(Testimony of Robert M. Hardy.)

Q. And starting in 1930 you started to work those assets out, did you? I mean the bank.

A. Yes sir, I did, and when things got tougher and tougher I asked him for more time and he told me to go ahead and do the best I could and he would see what he could do about it.

Q. The Yakima First National was examined from time to time by the National Bank Examiner?

A. Yes sir.

Q. As a matter of fact there was an examination by [122] Mr. M. J. Cook, National Bank Examiner on December 14, 1934.

A. Yes sir.

Q. He went into the bank there on the morning of December 14, 1934——

A. I can't testify that he came that morning, it was around the middle of December, I recollect that——

Q. That would be three days after this alleged transaction occurred—this letter of December 12th.

A. The 14th would be two days after the 12th, yes sir.

Q. Did you at that time advise the bank examiner that the bank was dealing in stock in accordance with that letter?

A. I told him all about this transaction.

Q. Where did this conversation take place?

A. Either in my office or the director's office. Mr. Cook had his headquarters in the director's office, or it was in my office.

Q. Just relate the conversation you had with the bank examiner.

(Testimony of Robert M. Hardy.)

A. I told him about the purchase of the 7500 shares——

Q. By the holding company or by the bank?

A. By the bank—and told him how it was done.

Q. Give the conversation.

A. I told him the whole transaction we had—we bought the 5000 shares which was Alex Miller's stock, and went on the market and bought the 2500 shares——

Q. By 'we'——

A. I am referring to the bank—— [123]

The Court: We have so many corporations here—its much better to give the name of the corporation you are talking about instead of saying 'we'.

A. The handling of all the company affairs of record were handled by Mr. Bradshaw. He was going to borrow the money from the bank and bring the note in to me to sign—take it over and put it on record—if he sold any stock it was handled in his office——

Q. Of the Guaranty Trust Company office.

A. Yes sir. Where the Holding Company records were kept.

Q. All right. You said you had a conversation with Mr. Cook at that time? A. Yes sir.

Q. And you say you told him about the purchase of the 7500 shares of stock?

A. That is correct.

Q. Did you show him the letter of December 12th?

(Testimony of Robert M. Hardy.)

A. I don't remember showing him the letter.

Q. What did he say to you?

A. He said 'you know you can't buy stock'—and I said 'I know we can't—we are buying it thru the Holding Company'.

Q. What did he say to that?

A. At that time the 7500 shares of stock had quite a nice little profit on them—

Q. The mining stock had raised?

A. Yes, it had.

Q. How much of it had raised — I mean how much had [124] it raised from the time you purchased it up until January 5th when you allowed the write-up?

A. The write-up fee was 25c to the Holding Corporation.

Q. Who arrived at that fee?

A. It was discussed between Mr. Bradshaw, Mr. Rightmire and myself.

Q. And you decided to write up 25c——

A. To give them that as their fee.

Q. Did the Examiner give you a copy of his report?

A. Yes.

Q. Did he give the bank a copy of that report?

A. Yes sir.

Q. Do you have that report?

A. No, I don't.

Q. As a matter of fact there is no mention made on that report of the bank buying any stock.

A. No sir.

(Testimony of Robert M. Hardy.)

Q. Nothing on the bank's records of buying any stock? A. No sir.

Q. You still say December 14th you had this conversation with Mr. Cook, the Bank Examiner here?

A. Yes sir.

Q. And you advised him the bank had purchased 7500 shares of stock. A. Yes sir.

Q. And had an agreement with Mr. Miller to turn over an additional five thousand shares to the Holding Company?

A. The agreement with Mr. Miller at that time wasn't fully completed, but it was completed before he left there. [125]

The Court: Before Mr. Clift left there?

A. Yes.

Q. What other conversation did you have with Mr. Cook? A. Oh, I had lots of conversations.

Q. In relation to the assets of the bank at that time?

A. I had a lot of conversations with him. They were trying at that time to get us to take this preferred stock—I don't know how many conversations I had with him. I saw him at various times. He called me at various times long distance.

Q. How long was he there, do you recall?

A. It was less than a week.

Q. When did Mr. Cook make his next examination? A. In June, 1935, as I recollect.

Q. You did, however, see Mr. Cook between December, 1934, and June, 1935? A. Yes sir.

(Testimony of Robert M. Hardy.)

Q. As a matter of fact you went over to Spokane to his home. A. Yes sir, I saw him at his home.

Q. And he was home, wasn't feeling very well—was sick? A. He had a cold, as I remember.

Q. Mr. Cook was in a bathrobe, wasn't he?

A. I think he was.

Q. What conversation did you have at that time?

A. We were still discussing this preferred stock.

Q. Was that in June or was that in April? [126]

A. I would say that was, I think, along in April, Mr. Winter.

Q. About the forepart of April, would you say?

A. Yes sir.

Q. About the 3rd of April?

A. I can't give the exact date—it was before the 10th.

Q. It was before you sold the stock that was delivered to the Yakima Holding Company for the bank for sale thru Drumheller & White?

A. It was before we sold any of the Sunshine Mining Company stock that was owned by the bank.

Q. What conversation did you have with Mr. Cook at that time?

A. Well, they were pressing us, Mr. Winter, and I talked to him then about just putting this stock in the name of the bank—just putting it on the books of the bank——

Q. As a matter of fact didn't you tell him at that time you wanted him to take the stock into the bank at that time?

(Testimony of Robert M. Hardy.)

A. I thought it might relieve the situation.

Q. At approximately \$200,000 valuation?

A. Whatever the market was at that time.

The Court: You say they were pressing you—
was that on this Sunshine Stock?

A. No, on the R. F. C. to take that preferred stock.

Q. (Winter): You were to take that in as a contribution to the capital of the bank?

A. No, we couldn't do that, but it could be taken [127] in and the bank could owe the Holding Company——

Q. The bank hadn't paid for the stock at that time. A. We owed the Holding Corporation.

Q. Of course there were no entries made because that transaction wasn't consummated—is that right?

A. It was a short time after that——

Q. I understand you to say you asked Mr. Cook—just what you mean to say is you asked Mr. Cook if they would allow you to take the stock into the bank at the valuation whatever the market was at that time, as an asset of the bank, is that right?

The Court: You mean you would take it in under the theory the Holding Company owed the money to the bank—the stock was collateral and took it in to protect your loan——

A. No sir, take it in because the stock was worth more than what we paid for it, to show the amount of appreciation and that would write off some of the stuff——

(Testimony of Robert M. Hardy.)

Mr. Winter: Q. Did Mr. Cook tell you you couldn't do that?

A. Yes—he still urged the preferred stock.

Q. As a matter of fact you later had another conversation with Mr. Cook over the telephone when he was in Wenatchee. A. Correct.

Q. What did you state to Mr. Cook at that time?

A. Mr. Cook called me at that time and said 'what have you done with that Sunshine stock?' and I said 'We still have it'. [128]

Q. The Holding Company still have it?

A. The bank still has it.

Q. You say the 'bank'—do you mean the 'Holding Company'?

A. Mr. Cook didn't have anything to do with the Holding Corporation—he was crowding the bank all the time.

Q. He did examine both the bank and the Holding Company that time he was in there—on those occasions he was in there?

A. He went into Mr. Bradshaw's office to do it and I guess he did——

Q. You didn't stay there when he was examining the bank, did you? A. I certainly did.

Q. All the time he was there?

A. Whenever an Examiner was in the bank, Mr. Winter I was always there.

The Court: When was the phone conversation in Wenatchee?

A. Not very long after I was in Spokane. I would say a week or ten days.

(Testimony of Robert M. Hardy.)

Q. (Winter): There was nothing in the records of the bank to show it owned the stock?

A. No sir.

Q. The letter wasn't exhibited to Mr. Cook?

A. I testified, sir, I didn't remember showing it to him.

Q. As a matter of fact you know it wasn't shown to him. A. I do not know, sir.

Q. There was nothing in the minutes of the Holding [129] corporation that the stock was owned by the bank up until 1935.

Q. I don't think there were any meetings of the executive committee until that date, sir, that is of record.

Q. Just relate the conversation you had with Mr. Cook when he called you over the telephone concerning this stock, with respect to the assets of the bank, the condition of the bank.

A. He still was pressing——

Q. Give the conversation word for word about it.

A. I might say he said 'hello' first, and then went on to say what had I done about the Sunshine stock—'Bob, what have you done about Sunshine stock?' and I said 'the bank still has it'—'Don't you think you better sell it now—the price of it is up pretty well'. I said 'We think its going higher and we want to hold it longer'. Now I remember that specifically, Mr. Winter, because I did sell that stock before my own judgment said sell it, because he had pressed me to do it. I would have held it for a higher price——

(Testimony of Robert M. Hardy.)

Q. Just a minute—you aren't giving the conversation. I asked for just the conversation.

A. Well, that's the substance of it.

Q. Mr. Cook asked you to do it—Mr. Cook asked you what have you done with the Sunshine Mining stock, and you said you hadn't done anything about it and the bank still owned it—did you use the word 'we' or 'the bank'?

A. When I talked to Mr. Cook I was talking to him [130] on bank matters.

Q. Did you always use the word 'we' when referring to the Holding Company?

A. I was running the bank and I would say 'Holding Company' when referring to the Holding Company.

Q. You were president of the Holding Corporation?

A. That's correct, yes sir.

Q. You were delivering the Holding Company stock to Drumheller, Ehrlichman and White?

A. I differ with you about that being Holding Corporation stock.

Q. Well, you delivered the stock to Drumheller, Ehrlichman & White?

A. Yes sir.

Q. You were handling the entire transaction with respect to that stock personally, weren't you?

A. Yes sir, very definitely.

Q. How long after the conversation in Spokane did you have this conversation with Mr. Cook at Wenatchee?

A. My recollection, Mr. Winter, is that it was within a week.

(Testimony of Robert M. Hardy.)

Q. Within a week? A. Yes sir.

Q. Would you say about the tenth of the month, then? A. I think that's right.

Q. It may have been a few days either way?

A. Yes sir.

Q. But it was shortly after your conversation, and at that time you told him you had not disposed of the stock [131] — you still had it?

A. Correct.

Q. Did you call him up or talk with him any time later after that, prior to his examination of the bank in June, 1935? A. I think I did, Mr. Winter.

Q. Was that after the sale of the stock, about April 30th? A. Yes sir, it was after that.

Q. What did you say to Mr. Cook and what did he say to you in that conversation—where did it take place?

A. My recollection of my calling him was to let him know I was going East to the graduation of my boy at West Point, and while I couldn't ask the bank examiner not to come while I was gone, I just asked him if he wouldn't come when he knew I was going to be away—that's my recollection of the conversation.

Q. You didn't tell him you had some new money in the bank, or anything of that nature?

A. I don't remember telling him that. My purpose of calling him was to let him know I was going to be away.

Q. You didn't tell him you had some new money—— A. I don't remember that.

(Testimony of Robert M. Hardy.)

Q. And when he pressed you as to where you got it you said—‘well, I didn’t steal it, Johnny’.

A. I don’t remember that.

Q. Would you say you didn’t say that?

A. No sir. If I told him I had some new money I [132] very likely told him I sold Sunshine Mining stock.

Q. What did you mean when you said ‘I didn’t steal it’?

A. I don’t know as I told him ‘I didn’t steal it’.

Q. You just finished telling us about a conversation you had with him about this transaction?

A. I didn’t say I told him that in the conversation.

Q. If he put that in his report would you say that was not the truth?

Mr. Cheney: What statement are you talking about? I haven’t the slightest idea. I tried to follow you——

The Court: That sometime later Mr. Hardy called Mr. Cook and told him there was some new money in the bank.

Mr. Witness: I didn’t testify to that. I said I called him for the purpose of letting him know I was going East—I don’t remember anything about that statement.

The Court: You don’t remember about the statement that you were putting new money?

A. No.

Mr. Winter: Q. Did you tell him anything about the transaction?

(Testimony of Robert M. Hardy.)

A. I don't remember. The purpose was to let him know I was going to be out of town, and out of the bank.

Q. Did you assure him the bank was in better condition—

A. I don't remember talking anything about the bank—only that I was going to be away and hoping he wouldn't come to the bank while I was gone. [133]

Q. Didn't you assure him in that conversation the bank was in better shape?

A. I don't remember that.

Q. Would you say you didn't mention that in your conversation? A. That's foolishness.

The Court: Mr. Winter has a right to ask you that, and that is for me to decide.

Mr. Cheney: I object to the question—

The Court: The objection is overruled.

Question read: 'Would you say you didn't mention that in your conversation?'

A. I would not.

Q. You might have said it?

A. I wouldn't say I did not say that.

Q. You might have told him then the condition of the bank was better.

A. I don't think I did.

Q. And you don't think you told him you had sold the stock?

A. Well, I don't remember that. My only recollection of that conversation is what I have told you.

Q. Your purpose of calling him, I take it, was to

(Testimony of Robert M. Hardy.)

ask him to delay the examination of the bank until you got back?

A. Mr. Winter, I wouldn't ask any bank examiner to delay his examination. I wanted to let him know——

Q. Well, to meet your convenience then, let's put [134] it that way.

A. No, his coming here would have been—while I was away—would have been, not exactly futile, but it couldn't have been complete because I was running the bank and I was the man he was talking to.

Q. You say they were pressing you to clean out those assets which were doubtful?

A. That's right.

Q. And according to your testimony you had by this transaction, the sale in April between the 23rd and the 30th of April, you had got some other capital, at least, to the extent of the profit on the sale of the stock, into the bank. A. Yes sir.

Q. And by that you said it helped the condition of the bank? A. Right.

Q. You say now you don't recall—whether or not you called him to advise him you had helped the condition of the bank?

A. I know I didn't call him to advise him—I might have wanted to surprise Mr. Cook when he came into the bank.

Q. You don't say that you did intend to do that?

A. No sir.

Q. Now, you say you might have wanted to surprise him——

(Testimony of Robert M. Hardy.)

A. Yes sir. I know what my purpose was.

Q. Where did you call him—Wenatchee? [135]

A. No, I think it was Walla Walla.

Q. Didn't you also tell him when he pressed you as to where you got the money, or how you arranged it, you said 'Johnny, I waked up in the middle of the night and the thought just struck me how I could handle it'?

A. I didn't tell him that—I know that.

Q. Did you see a copy of this report?

A. No sir, nothing with anything like that.

Q. Did you make any memorandum or record of the conversation you had with him? A. No sir.

Q. You are testifying entirely from memory?

A. I have a very definite memory of why I called him.

Q. The boy was graduating from West Point at that time? A. Correct.

Q. When did Mr. Cook come into the bank on the next examination?

A. It was before the first of July.

Q. Did you have a conversation with Mr. Cook during that time about June 24, 1935? During that Examination? A. Yes sir, lots of them.

Q. Did you show the letter to Mr. Cook and explain the transaction to him?

A. No, I didn't show it to him then because it was all over.

Q. You explained the transaction to him at that time, didn't you? A. He knew—we had——

(Testimony of Robert M. Hardy.)

Q. I asked you if you explained it—did you explain the transaction to him?

A. You say ‘explain the transaction’ — that means go clear back to April—we sold the stock, got so much money for it and charged off so many assets.

Q. You explained you had sold the stock in April and taken the profits into the bank.

A. That’s correct.

Q. That appeared on your records in the bank.

A. Yes sir.

Q. As a contribution to the capital.

A. No sir.

Q. How did you take the profits into the bank?

A. We sold the stock, paid the Holding Corporation what it was out and the balance was ours.

Q. Where did you carry that—as a contribution to the capital? A. No sir.

Q. What account did you put that in?

A. Just charged off assets—went into the surplus account that would be my guess.

Q. And charged to charge off a corresponding amount. A. Yes.

Q. And that’s the first time any record was made on the books of the Yakima First National Bank as to that transaction?

A. There wasn’t any record of that transaction at that time.

Q. Except putting it in the surplus. [137]

(Testimony of Robert M. Hardy.)

A. We put a certain amount of money in the surplus and charge off some—or so much assets.

Q. As a matter of fact—isn't it a fact that the letter of December 12th, 1934, was not written until about the time of the sale of the stock, and the minutes of the meeting of the Holding Corporation referring to it.

A. No sir.

Mr. Winter: I think that's all.

Redirect Examination

By Mr. Cheney:

Q. With reference to where the books of the bank—as to what account the proceeds of this stock went into I call your attention to Exhibit '25' of undivided profits account, and ask you if that isn't the account——

A. Yes, I did mean undivided profits instead of surplus.

Q. Is it the same thing?

A. No it isn't the same thing. Usually surplus is handled around the end of the year.

The Court: Were you carrying those assets in your books as of what value—these assets which the Examiner objected to? He was objecting to certain assets as I understand—now on what basis were you carrying them?

A. Some of them had been charged down—we charged them down as fast as we could, but they were still unacceptable to the bank examiner.

Court: They were still being carried at what the bank examiner thought they were worth?

(Testimony of Robert M. Hardy.)

A. Yes—— [138]

Mr. Cheney: Q. Mr. Hardy who was the officer who handled the transactions of the Yakima Holding Corporation?

A. Mr. George H. Bradshaw.

Q. And who handled the business and affairs of the Guaranty Trust Company?

A. George H. Bradshaw.

Q. Who handled the business affairs in the executive end of the Yakima National Bank?

A. I handled that.

Q. Now, coming back to the letter of December 12th—calling your attention to a sentence in the second paragraph reading as follows: “We are doing this on the express understanding that the stock of the Sunshine Mining Company will be taken over by the Bank at the stipulated price of \$12 per share”. Was that sentence I refer to there the idea of the bank taking it over at \$12 a share—was that a part of the original deal with Mr. Miller?

Mr. Winter: Object to that as not the best evidence. Its not ambiguous.

Objection overruled.

A. It was the original deal with Mr. Alex Miller.

Q. And was that consummated, and was that the transaction that went thru on the bank getting the stock? A. Yes sir.

Q. Now, in reference to this paragraph or sen-

(Testimony of Robert M. Hardy.)

tence—did that original understanding with Mr. Miller have anything to do with the form in which the transaction [139] was finally worked out?

A. Yes sir, very definitely.

Q. Explain.

A. When—well, Mr. Miller offered to sell Sunshine Mining Company stock to the bank——

Mr. Winter: Now, if your Honor please we will object to what he offered to do. He is going into now what he previously offered to do,—

The Court: Its merely preliminary—the reason why the transaction was handled the way it was. Objection overruled.

A. (Continuing): Mr. Miller had originally on a number of occasions offered to sell to the bank some Sunshine Mining stock at a low price. I explained to Mr. Miller that the bank couldn't buy it. This deal was finally worked out and handled thru the Holding Corporation.

Q. For what purpose?

A. For the benefit of the bank.

Q. Calling your attention to Exhibit 10, page 19, and the last four items on the left hand page, an entry reading “August 17, Y.F.N.B., 1000 shares Sunshine Mining Stock, \$7725”, in reading that will you interpret it—in the language of banking business what does that line mean?

Mr. Winter: We object to that—in this witness' own testimony he said that Mr. Bradshaw handled all this and he is asking about Yakima Holding Corporation records.

(Testimony of Robert M. Hardy.)

Mr. Cheney: I am asking what that means as a matter of business transaction and business practice.

The Court: The objection is sustained. [140]

Mr. Cheney: Your Honor, in relation to the last question, we offer to prove that in ordinary business practice the entry of items in a journal or ledger bearing the name of a certain person is notice that the property named in the item, whether it be shares of stock or anything else, is the property of the person whose name appears in connection with the item. That it is normally understood that relates to the ownership of the property.

The Court: The offer will be denied.

Q. Now, coming back to the time with reference to Mr. Cook in December, 1934, when he was in Yakima and when, you testified, you told him about the purchase of stock by the Yakima First National Bank, who all were present besides yourself and Mr. Cook, if anybody?

A. Mr. Rightmire and myself were with Mr. Cook.

Q. Now, this visit of yours to Mr. Cook in Spokane, was that upon his initiative or upon your initiative?

A. As I recollect he made one of his periodic calls to me trying to urge this preferred stock, and I was on my way to the Sunshine mine and stopped in Spokane to see him, and went down to the office and found he was sick.

(Testimony of Robert M. Hardy.)

Q. Now, at that time you say there was some conversation with reference, I think, you used the language of taking the Sunshine stock into the bank—what did you mean by that?

A. I mean taking it into the bank at its then market price.

Q. You mean putting it on the books—set it up?

A. Yes, thats right. [141]

Q. Is that what you meant by this taking it in?

A. That is correct—by putting it on the books at its enhanced value.

Q. Now in the conversation when Mr. Cook called you from Wenatchee in that conversation was any mention made as to what the market price of the stock was at that time?

A. Yes, there was.

Q. What was it?

A. It was around \$15.

Q. Was that mentioned in the conversation?

A. Yes.

Mr. Winter: He can ask for the conversation. This isn't proper redirect. The witness didn't testify to any such statement being made.

Objection overruled.

The Court: You asked him about a conversation. He gave the conversation. Now Counsel has a right to elicit other parts of the conversation that were not brought out or inquired about.

Q. As a result of that conversation you had with Mr. Cook did the Yakima First National Bank

(Testimony of Robert M. Hardy.)

take any action different than they otherwise would? A. Yes sir, we did.

Q. What?

A. We sold the stock sooner than my judgment to sell it. My judgment was the stock was going higher, but because he had pressed me on it I sold earlier and didn't get so much for it. [142]

Q. Now, in reference to one other thing. In the letters of December 11th, exhibits 16 and 17, and in exhibit 19 there is reference to delivery by the Holding Company to Alex Miller of four thousand shares of Holding Company stock, and according to the record nothing was done toward the delivery of that stock actually to Mr. Miller until some time after the minutes of your meeting of April 12, 1935. What was the reason, if any, for the delay in getting the stock delivered to Mr. Miller?

A. Mr. Miller was in California, and just before we had this meeting Mr. Bradshaw came in to me and said 'we'll have to have a meeting to authorize this thing—a meeting of the executive committee to authorize this thing. Mr. Miller is coming back and we should deliver him this stock.' So we had this meeting.

Q. This recites that prior to that time, or until this meeting the par stock of the Yakima Holding Company had had a value placed on it by the Directors of \$20 a share—is that correct?

A. That is correct.

Q. Then one of the reasons for calling the meet-

(Testimony of Robert M. Hardy.)

ing was to make a reduction in the value from twenty dollars to fifteen dollars. A. Yes sir.

Q. And then that reads as follows:

“The Secretary then pointed out that it would be necessary to issue some new stock to Mr. Miller in fulfillment of the transaction, and that in as much as the price fixed for the sale of the capital stock had been previously fixed at \$20 per share, [143] it would be necessary to have a resolution approving the issuance of any new stock at \$15 per share. It was then moved by Mr. Bradshaw, seconded by Mr. Rightmire, that in order to consummate certain plans of reorganization that had been under consideration by the officers of the company for some time that it was necessary that some additional stock of the corporation be disposed of and that in view of changed economic conditions it would be necessary to fix a lower price than the \$20 per share provided for in its previous issues of stock, and that we now authorize the issuance of such additional stock as may be necessary to complete the transaction with Mr. Miller at a price of \$15 per share, and also authorize the disposal of such other stock as may be necessary to carry out the contemplated plans of reorganization at a price of \$15 per share. This motion being put was unanimously approved.”

Now, Mr. Hardy during this entire period of

(Testimony of Robert M. Hardy.)

time were there plans of reorganization of the various banks?

A. Yes we had a lot of plans under consideration. One of them, if you want me to illustrate, was to put the bank and trust company together.

Q. He asked you about the write up on the 7500 shares of stock and no write up on the five thousand shares of stock, in reference to the write up does Exhibit 19 correctly designate upon which stock and on how many shares of stock the write up was to occur on?

A. Yes, it refers to the 7500 shares of stock only. [144]

Q. Was there any agreement or understanding between the Yakima First National Bank and the Yakima Holding Company there would be a write up on the five thousand shares involved in the second paragraph?

Mr. Winter: There is written evidence of what the transaction was and that is the best evidence.

Objection sustained.

Mr. Cheney: That is all.

Re Cross Examination

By Mr. Winter:

Q. In that connection, also, in connection with the write-up, Mr. Hardy, the Holding Company for the bank reported the dividends received on the five thousand shares from Alex Miller, did they?

Mr. Cheney: I object to that. The Holding Com-

(Testimony of Robert M. Hardy.)

pany returns you put in here shows they reported it.

Mr. Winter: I mean the 7500—

The Court: What do you mean?

Mr. Winter: I asked the witness on the five thousand shares. They reported on the 7500.

Witness: I would have to look at the books. I never saw that page. I never made out a report of the Holding Company.

Q. Where did the Yakima Holding Company purchase its own stock which they sold to Alex Miller—who did they purchase that from?

A. I think some of it shows in the minutes.

Q. I show you what has been marked for identification Defendant's exhibit 'C'. This is the investment account [145] of the Yakima Holding Corporation—stock investment.

Q. Now, the Yakima Holding Corporation had to go out and buy stock from the First Security & Loan Company—16785—to transfer to Mr. Miller, did they not?

A. I think about all they did was cancel the note.

Q. Well, they did purchase it from—

A. I would say there was no money paid for it.

Q. And that refers to cash receipts journal 39—which is plaintiff's exhibit No. 11—stock purchased—"Alex Miller agreed to exchange 5000 shares stock Sunshine Mining Company @ \$12 per share for 4000 shares stock Yakima Holding Corporation

(Testimony of Robert M. Hardy.)

@ 15 per share". In other words, the stock shown by the Yakima Holding Corporation purchased in your investment account, Exhibit 'C' shows the purchase on May 1st of the stock to transfer to Miller.

Mr. Cheney: I object to the form of the question. It shows the purchase of some of the stock to give to Mr. Miller.

Mr. Winter: How many shares does it refer to—1119 shares?

A. Yes.

Q. Where did the Holding Company get the other stock they transferred to Mr. Miller in exchange for the five thousand shares?

A. Why, I don't know. I imagine it just came out of the treasury.

Q. In any event the stock, at least 1119 shares of it, wasn't purchased by the Corporation or acquired [146] by the Holding Company until May 1st, 1935.

A. I wouldn't be positive as to the dates. I just know we cleaned off an indebtedness there by taking that stock in.

Mr. Winter: I offer Exhibit 'C'.

Mr. Cheney: No objection.

Defendant's identification 'C' (Acct. showing purchase of 1119 shares Y.H.C. stock C.D.J. 21—16785) admitted in evidence and becomes Defendant's Exhibit 'C'.

(Testimony of Robert M. Hardy.)

[Printer's Note: Defendant's Exhibit C is set out at page 442 of this printed record.]

Mr. Winter: I think that is all.

The Court: How much did the Sunshine stock go up between December and April?

A. From \$12 in the latter part of April to \$22 or \$23.

The Court: So you had a profit on it of \$121,000.

A. \$10 a share.

The Court: Suppose it had gone down and you had a loss of \$121,000, what would you have done about it? Did you have any conversation between you and the other officers of the bank as to what you would do? In the letter of December 12th you agreed the bank would take the loss—did you have any conversation among yourselves as to what you would do in the event you had a loss on the Sunshine stock?

A. Frankly, no. We were so confident the thing was going up we took what you might say was a chance.

Q. It would have been a very serious matter if the stock had gone down—

A. You are right. [147]

The Court: You never had any conversation as to what steps you were going to take if the stock did go down?

A. We bought the first stock at seven or eight dollars and it had been that for a long while. We

(Testimony of Robert M. Hardy.)

didn't think there was a chance of losing on that. With Mr. Miller's stock we knew very well if there was a loss on that he himself would assume it. We didn't feel uneasy about it at any time.

Mr. Cheney: Q. The market price in November and December was how much?

A. About \$12.

Q. So in December when the second deal was made with Mr. Miller there was, roughly, a little better than \$4.00 per share profit on the 7500 shares. A. Yes—

Q. At that time the stock was listed on the exchange? A. Yes.

Q. Was there an active market at that time on Sunshine stock? A. Yes sir.

Q. Calling your attention to Defendant's Exhibit 'C'—labeled Yakima Holding Corporation—stock investment—purchased from First Securities and Loan Company 1119 shares"—Now there was a difference in the way they carried their stock investment and the way they carried the Sunshine stock—and by the way there was another—

Mr. Winter: We would like to offer as a part of the same transaction page 21 of the Cash Disbursements Journal I guess it is. The reason for it is the previous exhibit [148] refers to it—refers to that page and the notation with respect to the purchase of its own stock.

Mr. Cheney: No objection.

Plaintiff's identification 'D' (Page 21

(Testimony of Robert M. Hardy.)

C.D.J.) admitted in evidence and becomes Defendant's Exhibit 'D'.

[Printer's Note: Defendant's Exhibit D is set out at page 443 of this printed record.]

Witness Excused.

L. R. RIGHTMIRE,

a witness called for and on behalf of the plaintiff, having been duly sworn, testified as follows:

Direct Examination

By Mr. Cheney:

Q. At the present time what is your occupation?

A. Vice president of the National Bank of Commerce bank and manager of the Yakima branch.

Q. How long have you lived in Yakima?

A. Forty or forty one years.

Q. Prior to the fall of 1934 what were you doing?

A. Well, I was vice president of the Yakima First National Bank of Yakima.

Q. And active in the operation of the bank.

A. Yes sir.

Q. As well as being vice president you were one of the directors?

A. Director and member of the executive committee.

Q. By the way, what did the executive commit-

(Testimony of L. R. Rightmire.)

tee—who was the executive committee of the Yakima First National Bank in the fall of 1934?

A. Well, there was Mr. Hardy, George Bradshaw, Alex Miller and myself. [149]

Q. You four were the executive committee?

A. Thats right, and Mr. Larson up to the time of his death.

A. Did you have any connection with the Yakima Holding Corporation?

A. I was a director and member of the executive committee—I wasn't an officer.

Q. Did you have any connection with the Guaranty Trust Company? A. None whatever.

Q. During the time the Yakima Holding Company was in existence who was the executive head or personal operator of the business of the Yakima Holding Corporation?

A. George H. Bradshaw.

Q. During the same period of time who was the executive head of the Yakima First National Bank? A. R. N. Hardy.

Q. And the Guaranty Trust Company?

A. George H. Bradshaw.

Q. Now the two companies, the Yakima First National Bank was located on the corner of Yakima and South First Street? A. Yes.

Q. And does it operate the entire building?

A. Yes.

Q. Now the Guaranty Trust Company is where?

A. Just east of the Bank building on Yakima Avenue.

(Testimony of L. R. Rightmire.)

Q. In a separate building?

A. A separate building. [150]

Q. Where was the business of the Yakima Holding Company transacted?

A. In Mr. Bradshaw's office of the Guaranty Trust Co.

Q. Now, during the fall of 1934—say the month of August, did the executive committee of the Yakima First National Bank take any action in reference to acquiring Sunshine Mining Company stock?

A. Well, I couldn't say just what month, but shortly after Mr. Larson's death, which was in June, it was within a month or two after that it decided to buy 7500 shares of Sunshine stock.

Q. Do you know of your own knowledge whether or not some time about that time whether or not the bank did buy 7500 shares of Sunshine stock?

A. Yes, I do.

Q. Do you know from whom or in what manner that stock was bought?

A. I do not from my own personal knowledge.

Q. Now, later on in December of 1934, was there some further transaction in reference to the bank acquiring more Sunshine stock?

A. Yes, there was.

Q. Tell us about that.

A. Well, I can tell you roughly how that transaction was handled—how that transaction happened, I should say, but just exactly what was said

(Testimony of L. R. Rightmire.)

I could not. Mr. Miller was desirous and expressed himself as desiring to do something to help clean up the assets of the Yakima First National Bank because the ones that they were [151] particularly worried about had been taken over from the First National of which he was an officer and director, and I figured at the time, and I think he did, it was more in the form of a donation—he agreed to put up five thousand shares of stock the bank might sell and recover whatever they could from that to take out these questionable assets. In talking it over he arranged to trade——

Mr. Winter: I object. The agreement is the best evidence.

Objection sustained.

Q. Now in carrying out the arrangements was there a letter written in December between the Yakima National Bank and the Yakima Holding Company in reference to buying the 7500 shares and the Alex Miller's additional five thousand shares? A. Yes, there was.

Q. Can you tell us approximately when that letter was written?

A. Other than the fact it was before Mr. Miller went to California along in December is as near as I can tell you from recollection about it.

Q. Now it appears that Mr. Cook came there for an examination of the bank some time along about the 14th day of December—assuming that the 14th is the correct date, would you say the letter was written before or after or about that time?

(Testimony of L. R. Rightmire.)

A. Well, I have just one way of fixing that as being prior to Mr. Cook's coming into the bank, or at least [152] it was during the examination we had a little argument—Cook said that was *ultra vires*, and I took exception—'ultra vires'—it was *ultra viris*, I said, and it seemed by checking he was right. It was a new pronunciation to me.

Q. And the letter had been written prior to the time you had this talk with Mr. Cook?

A. Yes, that is my recollection of it.

Q. In relation to the actual delivery of the letter to Mr. Bradshaw, were you present at the time the letter was brought into the bank?

A. Yes, I was.

Q. To whom was the letter given?

A. Mr. Bradshaw brought the letter into Mr. Hardy's office, and the three of us looked it over and read it over at that time.

Q. Was there any discussion about who should sign the letter for the bank?

A. Yes.

Q. What was that?

A. Well, in this intermingling of these different companies it seem like Mr. Bradshaw, Mr. Hardy and myself were connected with both companies, and Mr. Crawford the cashier had no connection with the Holding Corporation, and we felt it was best to have Mr. Crawford sign for the bank as cashier.

Q. Now, by the way, in the original arrangement with the Yakima Holding Corporation for the

(Testimony of L. R. Rightmire.)

purchase of the original 7500 shares, was there any understanding [153] between the bank and the Holding Company as to whom was to receive the dividends off of the Sunshine stock until the bank paid for it? A. Yes, the agreement was——

Mr. Winter: Object to it—the agreement is in evidence. Its an attempt to vary the terms of a written instrument.

Mr. Cheney: I call the Court's attention—the memorandum of December 12th was a memorandum confirming the understanding——

Mr. Winter: Thats writing down the understanding and putting it in writing.

Mr. Cheney: The same questions were asked and answered by Mr. Hardy and there was no objection——

The Court: That doesn't make them good. I will sustain the objection.

Mr. Cheney: We offer to prove by this witness the same matter substantially as testified to by Mr. Hardy to the effect that in the original understanding it was also understood the dividends during the time of purchase money was out until such time as the Holding Company was repaid was to be received by the Holding Company.

The Court: I will sustain the objection.

Mr. Cheney: Exception, if your Honor please.

Q. Now in reference to Mr. Cook he came there as has been testified to, and examined the bank some time in December. A. Thats correct. [154]

(Testimony of L. R. Rightmire.)

Q. And at that time was there any conversation between Mr. Hardy, Mr. Cook and yourself in reference to the bank's purchase of both the 7500 shares of stock and the Miller proposal of five thousand shares? A. Yes sir.

Q. Just tell us—where did the conversation occur?

A. Within the bank. I don't remember whether in the directors' room or whether it was in Mr. Hardy's office.

Q. State as near as you can the substance of the conversation in so far as it referred to the purchase of the Sunshine stock.

A. Well, Mr. Hardy explained very carefully this deal—during the examination in December, 1934 by Mr. Cook—that without a question this stock was going to increase in price, and that would give us funds with which to take out items that had been criticized by the examiner, Mr. Cook.

Q. Was the conversation directed toward the bank or the Holding Company, or anybody else?

A. This was the bank we were talking about.

Q. By the way were there conversations about the—as to the value of the Sunshine stock, how much it had already raised since the 7500 shares were bought?

A. During this December conversation?

Q. Yes.

A. I can't tell—

Mr. Winter: Ask for the conversation. Don't lead the witness. We object to it—its leading.

(Testimony of L. R. Rightmire.)

Objection sustained. [155]

Mr. Cheney: I think I have a right to direct—this is part of the conversation he hasn't covered.

The Court: If your witness said he has completed the conversation, and you think there is something more you can direct his attention to it. Your first duty is to ask for the conversation, and then find out if he has exhausted his recollection on the subject.

Q. Have you given us as near as you can everything that was talked over about the Sunshine stock purchased by the Bank between you and Mr. Hardy and Mr. Cook when all three of you were together?

A. I just can't say there was anything—I don't recall anything as to the appreciation of the mining stock mentioned at that time, in that conversation.

Q. Is there anything that you have not testified about at this time that was said in that or those conversation?

A. You mean during the time Hardy and Cook and I were together?

Q. Yes——

A. Well, I couldn't tell you the actual words that were said—it was regarding the purchase of that stock and with Mr. Hardy's knowledge of it and belief the price would increase enough to enable us to take out a large portion of these criticized items.

(Testimony of L. R. Rightmire.)

Q. Now was there any conversation at that time with reference to Mr. Miller's second sale or trading five thousand shares?

A. The whole Sunshine transaction for 12,500 shares [156] was discussed.

Q. Now, subsequent to that time did you have a conversation or conversations with Mr. Cook during the same examination, and in the bank in December?

A. Well, yes, during his stay Mr. Cook and I reviewed the loans—I think practically every day during his stay of several days we held conversations, particularly I remember of one after the Sunshine purchase by the bank had been explained to him. That's when we were in about the final wash out of those notes—as we call it—and discussing it with Mr. Cook. He said we—I think he meant he any myself, could go a long ways with fellows like Mr. Hardy. If anybody could work this deal out he could.

Q. What was this ultra vires stuff?

A. Well, that—as a matter of fact it was ultra vires and Mr. Cook told us we couldn't do that. We hadn't purchased this stock—it was being held by the Yakima Holding Corporation—the profits were to be used to eliminate——

Mr. Winter: We object—he doesn't appear to be reciting a conversation—

The Court: You were asked as to conversations you and Mr. Cook and Mr. Hardy had together,

(Testimony of L. R. Rightmire.)

the three of you, and that you testified to, and now you are asked about a conversation or conversations you and Mr. Cook had with each other.

Mr. Cheney: Particularly the one in which ultra vires was mentioned—about when did that conversation occur? [157]

A. I can't tell you the exact conversation at that time.

Mr. Winter: What time?

A. At the time that Mr. Cook and I were talking about this ultra vires. Exactly what the words were I couldn't tell.

Mr. Winter: What time was that?

A. I am referring to conversations during his examination of the bank in December. He was there I should judge five or six days. I don't remember identically the week he was there.

Q. (Mr. Cheney): Give us that conversation as nearly as you can, the whole thing.

A. Well, I do know during that conversation Mr. Cook said he believed he would not write that up in his report but that some appraisal of some sort would have to be made before his next examination or he would write it up.

Q. What was this ultra vires—how did that come up?

A. That was about the Sunshine stock—it was ultra vires for the bank to purchase that stock.

Q. Did he make that statement at that time you are talking about? A. That's right.

(Testimony of L. R. Rightmire.)

Q. I now hand you plaintiff's exhibit 19, Mr. Rightmire, and will ask you if you ever saw that letter before and if so when and under what circumstances.

A. Well, this is the letter I referred to a moment ago that Mr. Bradshaw brought into Mr. Hardy's office at which time, I was present. We discussed the [158] letter. After we read the letter we discussed it and decided who was going to sign it for the Yakima First National Bank—and decided to have Mr. Crawford sign on behalf of the bank.

Q. Did you see Mr. Crawford sign it?

A. I don't believe I did. I don't recall seeing him sign it.

Q. And as near as you can recollect was the date December 12 approximately when that occurred?

Mr. Winter: The witness said he didn't see him write it.

Mr. Cheney: I am asking about the date the letter was brought to him.

A. As near as I can recollect that far back this whole transaction regarding Mr. Miller's stock, including this understanding we had was fixed up before Mr. Miller left in December for California. That's my recollection of it, and I think it was approximately the same time that we had the letter from Mr. Miller.

Q. Handing you Plaintiff's exhibits 16, 17 and

(Testimony of L. R. Rightmire.)

18, are those the letters you are referring to as to and from Mr. Miller.

A. Yes, this is the letter I referred to.

Q. Now, based upon your recollection would you say that December 12th was or was not approximately the date the letter was brought into Mr. Bradshaw?

A. I think from my best recollection that was the approximate date.

Q. Now, subsequent to those transactions, Mr. Rightmire were you present at a meeting of the executive [159] committee of the Yakima Holding Company—about on April 12, 1935, or approximately that date, April, 1935?

A. Well, I was there on the job at that time, I don't remember that particular date.

Q. Now, prior to that meeting were you present in Mr. Hardy's office at the time when the telephone call came in from Mr. Cook? A. I was.

Q. Your only knowledge as to whom the call was from was the conversation at Mr. Hardy's end.

A. That's right.

Q. Can you give us an idea about when that was?

A. I couldn't say other than it was along in the Spring of 1935. I couldn't say whether it was April or May or when it was. The only reason I remember that particular conversation—

Mr. Winter: You didn't hear any conversation.

Q. You have some method by which you remem-

(Testimony of L. R. Rightmire.)

ber that particular conversation? A. Yes.

Q. What is it?

A. Because of the fact we were considering the very angle he had called our attention to there were assets in the bank that must be removed.

Q. From the conversation that you heard from Mr. Hardy's office can you state in reference to what the conversation was about?

Mr. Winter: We object, if the court please. Its apparent he didn't hear the conversation—he couldn't have [160] heard the conversation. He can ask him if he was present when Mr. Hardy was talking on the 'phone, and if he heard Mr. Hardy make some statements. He couldn't know who it was. It would be hearsay. The only way he could know it would be for Mr. Hardy to tell him afterward.

The Court: That question can be answered 'yes' or 'no'.

A. Yes.

Q. What was the conversation about?

Mr. Winter: Well now, we object.

The Court: Sustain the objection.

Q. Did Mr. Hardy tell you from whom the call came?

The Court: Answer 'yes' or 'no'.

A. Yes.

Q. Whom did he say the conversation was with?

The Court: The objection is sustained.

(Testimony of L. R. Rightmire.)

Mr. Cheney: We offer to prove Mr. Hardy at that time stated it was a call coming from Mr. Cook, National Bank Examiner and that the subject of the conversation was whether or not the bank had sold the Sunshine stock. That during the conversation Mr. Hardy told the party on the other end of the line the bank believed the stock would go higher and didn't want to sell it until they thought they could get more money for it—there would be a higher market price for the stock.

The Court: Objection sustained.

Mr. Cheney: Allow us an exception.

Q. Looking at Exhibit 15 I will ask you if those are the minutes of the Executive Committee meeting of the Yakima—— [161]

Mr. Winter: Those have been introduced in evidence.

Q. (Continuing): ——of the Yakima Holding Company at which you were present?

A. Yes sir.

Mr. Cheney: You may examine.

Cross Examination

By Mr. Keith:

Q. As I understand you Mr. Bradshaw was operating officer of the Yakima Holding Company.

A. Yes.

Q. And Mr. Hardy was president of both that company and the bank. A. Yes.

Q. As a practical matter there was never any dispute between Mr. Hardy and Mr. Bradshaw as

(Testimony of L. R. Rightmire.)

to the operation of the Yakima Holding Company.

A. Not to my knowledge. There might have been a difference of opinion.

Q. If it came down to a difference of opinion between Mr. Bradshaw and Mr. Hardy, Mr. Hardy's views would be those that prevailed.

A. I can't answer that. I think the Executive Committee perhaps would be asked if there was any argument.

Q. Well, the principal property of the Yakima Holding Company was the Yakima First National Bank?

A. That's correct.

Q. Mr. Hardy was head of that?

A. Yes.

Q. Without any reflection on any of the rest of them Mr. Hardy ran all of them pretty much— isn't that [162] true?

A. No—I think Mr. Hardy—my impression is and believe he distributed his energy to the Yakima First National Bank.

Q. Well, as a practical matter wasn't he really the responsible head of all of those companies, the Yakima Holding Company, the Yakima First National Bank, and the Yakima Trust Company and the Bank at Wapato?

A. That's true.

Q. And the mere fact that he had delegated the ordinary routine responsibilities of the Yakima Holding Company to Mr. Bradshaw didn't remove the fact that he was actually the main man in the whole set up, wasn't he?

(Testimony of L. R. Rightmire.)

A. He was the main man—when Mr. Hardy delegated the authority and left it to them to carry out he insisted they did.

Q. He designated most of the policies of the banks? A. I think not.

Q. His opinion was usually followed by the Executive Committee of the bank in which you were a member?

A. I think this—Mr. Hardy was very free to express his opinions and they gave weight to it, but the executive committee was really the one that decided the policy. The executive committee had meetings very often to discuss matters of policy, large loans, and things of that kind.

Q. In all of these other matters did you keep a record in the bank as carefully as you did of this transaction, which was one of considerable substance—did your executive committee operate pretty much as they did in that transaction [163] in other matters?

A. Our executive committee largely, I think, had the benefit of more than one person's judgment in matters of policy.

Q. It was not a formally convened body very often, was it?

A. The executive committee of the bank was, yes.

Q. Did the executive Committee ever write up any record of their transactions?

A. I think not.

(Testimony of L. R. Rightmire.)

The Court: You had a loan committee?

A. We had a loan committee that passed on loans and also had an executive committee that passed on large loans—

Q. It had a different personnel from the executive committee?

A. Yes, thats true. The executive committee was Mr. Bradshaw, Mr. Miller, Mr. Hardy and myself after Mr. Larson's death, and the loan committee so called was the active officers of the bank—certain of the officers like Mr. Clift, Mr. Hardy, Mr. Crawford and myself.

Mr. Keith: Q. Mr. Rightmire, you said, I believe, the executive committee decided after Mr. Larson's death to buy blocks of Sunshine stock—you meant by that I assume the executive committee of the bank. A. Thats correct.

Q. Do you remember who all were there when the executive Committee decided to do that? [164]

A. I can't definitely remember. I remember particularly Mr. Miller was there because he had quite a little to say about the Sunshine stock at that time.

Q. Mr. Miller and you and Mr. Hardy were there. Do you remember whether Mr. Bradshaw was there?

A. I can't, but I believe he was.

Q. You were on the executive committee of the Holding Company? A. Yes.

Q. This plan you said the executive commit-

(Testimony of L. R. Rightmire.)

tee of the bank decided upon required the necessary participation of the Holding Company, didn't it?

A. For the bank to purchase this stock?

Q. Yes—it was going to be done thru the Holding Company?

A. The Holding Company was to carry the stock.

Q. Now, as a matter of fact there was never any meeting of the Executive committee of the Holding Company prior to the time your committee from the bank decided to buy this stock and carry it on the records, on the company's books, was there? A. I believe there was.

Q. Would you say definitely there was?

A. I wouldn't say definitely there was. I believe there was. That's a long time ago.

Q. Now, as a matter of fact there wasn't anything illegal in the Yakima Holding Company buying that stock in 1934, was there?

A. No. [165]

Q. Was there anything in the records of the executive committee of the Holding Company that would indicate the executive committee of that corporation decided to buy the stock regardless for whose benefit it was bought?

A. Not to my knowledge. I don't know.

Q. They went ahead and bought it as their own transaction without any record on the part of the executive committee.

(Testimony of L. R. Rightmire.)

The Court: I'll sustain an objection to that. Its a double question.

Q. When you men who were on the executive committee of the bank decided to make this purchase of stock you, of course, were all aware it was illegal for the bank to purchase mining stock, weren't you? A. We were.

Q. You knew when you went into that huddle on that day and came to that decision that all of you who were there were conspiring to violate the National Banking laws?

Mr. Cheney: I object to that question. That is a very serious question.

The Court: I think the first question is sufficient—they all knew it was illegal. Now whether or not the getting together and agreeing on an illegal act constitutes conspiracy is a conclusion I don't believe this witness should be called upon to make.

Q. At any rate you gave some consideration at that time to what mechanics should be employed to work out this objective, didn't you? [166]

A. Yes sir.

Q. You realized, of course, the transaction might come in question some time, didn't you?

A. Thats right.

Q. And thats why you decided to impose on Mr. Crawford the doubtful honor of being the one who approved the transaction.

A. No, absolutely not.

(Testimony of L. R. Rightmire.)

Q. There wasn't any reason at that time, was there, Mr. Rightmire, why the Yakima Holding Company could not purchase that stock legally that you know of? A. Not to my knowledge.

Q. At that time in 1934 it wasn't within your power, or Mr. Hardy's power, or Mr. Miller, or Mr. Bradshaw, if he was there, to definitely ascertain with any degree of accuracy whether the Holding Company would or would not make any money in the year 1935, was there?

Mr. Cheney: That is obviously asking for a guess on the part of the witness.

Objection overruled.

A. What knowledge I had I didn't think there was a possibility of loss to be had—either one of those concerns would have had a profit.

Q. I don't quite understand that—you thought both of the concerns in 1935, both the Yakima Holding Company and the Yakima First National Bank would have losses during 1935?

A. At least I didn't believe there would be a profit. [167]

Q. There wasn't any possible reason for you to arrange the deal the way you did except it might affect the income tax of one or the other companies.

A. Yes, there was. There was a reason for it in my opinion.

Q. Was anything said about it?

A. The things that we discussed—we were at-

(Testimony of L. R. Rightmire.)

tempting to clean up the assets of the First National Bank as fast as we could, and that was the occasion for taking this opportunity—purchasing the Sunshine stock and attempting to clean this bank up as fast as possible.

Q. Couldn't that have been as easily and more legally by having the Yakima Holding Company making the purchase and making a capital contribution or donation to the bank?

A. Well, in the first place from my standpoint all the way thru I was interested in—my interest was devoted to working out the Yakima First National Bank affairs. My interest was in the bank and not in the Trust Company. The Holding Corporation owned control of the stock of the Guaranty Trust Company. There were other stock holders in the Yakima Trust. In the bank all the stock was owned, with the exception of a few, was owned by the Holding Corporation, except qualifying shares of the directors.

Q. None of you men owned any shares except as qualifying shares in the bank itself?

A. Thats right.

Q. But all owned shares in the Holding corporation. A. Yes. [168]

Q. And thru your ownership in the stock of the Holding Corporation you had your interest in the affairs of the bank? A. Thats all.

Q. As a practical matter there wasn't any reason at all why the Holding Company could not

(Testimony of L. R. Rightmire.)

have purchased these 12,500 shares of stock, realized whatever profit they might have received out of it and made a capital contribution or donation to the bank, was there? A. I think there was.

Q. What was the reason?

A. In other words, there were stockholders in the Yakima Holding Corporation—in other words, the Guaranty Trust Company had stock holders that owned stock directly in the Guaranty Trust Company that were not owners of stock in the Holding Corporation.

Q. What effect would that have on the affairs of the Yakima Holding Corporation if the Holding Corporation decided to make a capital contribution—

A. In other words the ownership was not identical. We were not attempting to work out anything in our arrangements and in our conversations—the thing we were attempting to do was to work out matters for the Yakima First National Bank directly.

Q. All the previous financing of the Yakima First National Bank had been done thru the Yakima Holding Company, hadn't it, so far as the capital stock was concerned.

A. Yes, they owned the capital stock. [169]

Q. They put up the money for the capital stock?

A. That's right.

Q. And there wasn't any reason why the Yakima Holding Company if they wanted to or needed to

(Testimony of L. R. Rightmire.)

could make a further capital donation, or purchased some shares of stock, or any other way to put some money, some more money into the bank.

The Court: If they made a capital investment in the bank that would simply increase the stock liability of the bank and wouldn't have made it possible to take out criticized assets.

Mr. Keith: It could have been a donation.

Q. When you come right down to it the only situation that prompted you members of the executive committee of the bank to take the course of action you took was of the possible effect it would have on the income tax of one or the other of the two companies? A. It was not.

Q. Now, let's go back a little bit. The affairs of the bank had been in a somewhat precarious condition and had been the subject of criticism for some time by the National Bank Examiner. A. Yes.

Q. This wasn't the first step which had been considered by the executive committee to relieve that situation, was it?

A. The executive committee talked and thought of everything in the world. That was the first time we had an opportunity to make an investment which in the [170] opinion of the executive committee was a good chance to show a profit.

Q. There had been other plans proposed and considered by you men to rehabilitate the capital structure of the bank? A. Yes.

Q. You had considered, among other things,

(Testimony of L. R. Rightmire.)

the purchase of preferred stock in the Reconstruction Finance Corporation.

A. That had been considered. We were forced to consider it, in other words.

Q. Among other things you were not forced to consider you had considered the possibility of consolidating the Guaranty Trust Company and the Wapato bank or the First National Bank and thereby bringing some new capital into the structure.

A. That's right.

Q. Do you know as a matter of fact on several occasions Mr. Hardy had informed the National Banking Department he would be able to put about three hundred thousand dollars new capital into the bank by purchasing from the Yakima Holding Company some of these deteriorated assets of the bank?

Mr. Cheney: I object to his knowing what Mr. Hardy did.

The Court: Let's substitute the word depreciated for deteriorated.

Q. Do you know of any such discussion between the Banking Department and Mr. Hardy? [171]

A. I knew of the discussion but I didn't know of any specific \$300,000.

Q. Do you know of a discussion along that line—maybe two hundred or two hundred and fifty thousand? A. Yes.

Q. You know in connection with these discussions the proposal, this exchange of letters between

(Testimony of L. R. Rightmire.)

Mr. Miller and the bank was a part—that had some relationship to this way of raising, increasing the capital structure of the bank?

A. Mr. Miller tried personally to help that much, and I know it was hoped that others might assist in the same way.

Q. He put the condition in his letter that the “exchange will not be completed unless a sum sufficient to make the total of new money to be provided for the Yakima Holding Corporation equals the sum of at least \$200,000——

A. In the final analysis Mr. Miller I think considered that more of a donation on his part—he was in hopes—there was only one other large stockholder that in his opinion would collaborate with him—

Q. That was the Larson estate? A. Yes.

Q. And at first, at least, he was unwilling to make his contribution unless the Larson estate would likewise do it.

Mr. Cheney: I think he is asking for a conclusion as to what Mr. Miller was willing or unwilling to do [172] is argumentative.

The Court: It is probably improper cross examination of this witness. It might have been proper cross examination of Mr. Hardy, but this witness so far as this transaction is concerned was asked only as to the details of the transaction.

Q. Mr. Rightmire, were you ever present at conversations between Mr. Cook and Mr. Hardy relative to this plan of the Larson estate and Mr. Miller,

(Testimony of L. R. Rightmire.)

and perhaps Mr. Hardy himself, and other interested parties making a contribution on behalf of the Holding Company which would permit the Holding Company to purchase the depreciated assets from the First National Bank?

A. Not that I remember of. We discussed so many different plans with Mr. Cook—that specific one I can't remember.

Q. Your recollection of Mr. Cook's mention of the word 'ultra vires' is much clearer than any of these other conversations?

A. That is one of the things I remember.

Q. And your recollection of long distance telephone calls is likewise much clearer than any of these other discussions with Mr. Cook?

A. No, I wouldn't say that is much clearer. Some other things I remember just as well as that.

Q. I think you testified on direct examination using the words 'it had been done'—when reference was made to Mr. Cook of these shares of stock—

A. Yes.

Q. You wouldn't say very definitely would you that [173] that conversation instead of taking place at the time of the December examination in 1934 took place in the June Examination of '35?

A. No, I can remember the June examination 1935 as clearly as I can the December, maybe more so.

Q. As a matter of fact that conversation took place in June, 1935, and not in December, 1934.

(Testimony of L. R. Rightmire.)

A. No, it was a different line of conversation in 1935.

Q. You didn't keep any notes of the conversation, did you? A. Why, no, absolutely not.

Q. You testified that Mr. Cook said at that time he believed he wouldn't enter in his report any mention of this illegal transaction on the part of the bank but unless it was rectified by the time of his next examination he would. Are you very certain whether Mr. Cook ever made any statement of that type at all? A. Its my recollection, he did.

Q. Would you say very definitely he did make such a statement he would report any violation of the National Banking laws to his superior officer if you went ahead and completed the transaction up to the time of his next examination?

A. I believe that statement was made.

Q. You wont say definitely it was made, would you, Mr. Rightmire?

A. Yes, I will have to say definitely that statement was made. [114]

Q. Then if you say definitely it was made then isn't it a fact a statement along those lines—not exactly in those words, was made in June, 1935, after the transaction had been completed, and not before it had been completed.

A. In 1935, frankly, we were very much pleased to have this charge off its out when the Examiner came along—We had been proposing to clean them up as fast as we could. I know I didn't hesitate to

(Testimony of L. R. Rightmire.)

tell him about the way we cleaned them up and the amount of money we had to apply from the Sunshine sale in taking out these assets.

Q. That was after it was done?

A. That was in the June examination.

Q. June of 1935?

A. That's right.

Q. You were perfectly willing to make the revelation to him at that time?

A. We always had told him exactly what our situation was.

Q. Now if you took Mr. Cook so completely into your confidence in December, 1934, why did you go to the trouble you did to work out the mechanics of the deal so it wouldn't appear on the records of the bank?

A. I think Mr. Cook, or any other examiner, will tell you we always gave them any information we had regarding the condition of the bank and 99%—

Q. What purpose could be served by not making a clean record of it on the books of the bank if you were going to [175] make a complete disclosure of it at that time he came and you had this ultra vires deal?

A. He was just as much interested in helping work that bank out as we were—he wanted to help us in every way.

Q. If you and Mr. Hardy and Mr. Miller and Mr. Bradshaw kept all the records of the transaction off the books, if as you say you made a complete disclosure of the transaction to the National Bank-

(Testimony of L. R. Rightmire.)

ing Department through Mr. Cook — what was gained by not making a record of it on the books of the bank?

A. There was nothing to gain until we either developed a loss or profit, and had taken these assets out. That is the thing we were striving for—the only thing we had in mind was to take those criticized assets out of the bank.

Mr. Keith: I think that's all.

Re Direct Examination

By Mr. Cheney:

Q. There was no particular reason, Mr. Rightmire, why you could not have borrowed the money from the bank and bought the stock and realized a profit on it and donated it to the bank yourself?

A. No.

Q. Or Mr. Hardy or anybody else?

A. No.

Mr. Cheney: That's all.

Witness excused.

[176]

R. M. HARDY,

recalled, having been previously sworn, testified as follows:

Direct Examination

By Mr. Cheney:

Q. The question was asked you this morning in reference to why the Holding Company, neither the Holding Company of the bank received any dividend

(Testimony of R. M. Hardy.)

on the five thousand shares of stock that Alex Miller delivered to the Guaranty Trust Company on the 11th day of December, 1934.

Mr. Winter: Object to that—that question wasn't asked of him. The question was whether they reported such dividends.

Q. Did either the Yakima Holding Company or the Yakima First National Bank receive dividends on that five thousand shares? A. No sir.

Q. Who received those dividends?

A. Alex Miller.

Cross Examination

By Mr. Winter:

Q. You did receive dividends on October 1st, 1934, on the 7500 shares at 16c a share, \$1200—the Holding Company—

Mr. Cheney: Object to that—not proper cross examination. That has already been testified to.

The Court: My impression is you asked Mr. Hardy if the Holding Company — that there had been no report on the dividends by the bank on the five thousand shares [177] and he answered neither the bank or the Holding Company got it.

Mr. Winter: We will offer the general ledger income account for '34 and '35 and that should be sufficient.

The Court: You mean the whole thing?

Mr. Winter: No, the dividend account showing those two entries on the Yakima Holding Company books—this sheet right here.

(Testimony of R. M. Hardy.)

The Court: The Holding Company did receive dividend on the 7500 shares.

Mr. Winter: Yes, your Honor—took it into this account—October 1st, 1934, Sunshine Mining Company dividend—7500 shares—at 16c—\$1200.

The Court: Can't that be stipulated?

Mr. Cheney: Yes.

Mr. Winter: And also stipulated in the income account of the Yakima Holding Company for the year 1935 shows entry January 2d, 1935, items Sunshine Mining Company dividend, 7500 shares, at 20c credit \$1500.

Mr. Cheney: That is so stipulated.

Mr. Cheney: With that I rest.

Mr. Winter: At this time we move to dismiss the action on the grounds that the plaintiff has failed to sustain the burden of proving the allegations of its complaint.

The Court: The motion is denied.

Mr. Winter: Exception.

The Court: Exception allowed. [178]

WILLIAM BRADSHAW,

a witness called for and on behalf of the defendant,
having been duly sworn, testified as follows:

Direct Examination

By Mr. Winter:

Q. Your name is William Bradshaw?

(Testimony of William Bradshaw.)

A. That's right.

Q. Where do you reside?

A. Olympia, Washington.

Q. What is your present occupation?

A. I have a general merchandise store there, and also Post Master.

Q. Are you the son of Mr. George H. Bradshaw?

A. Thats right.

Q. Who was secretary of the Yakima Holding Company? A. Yes.

Q. Were you employed by the Yakima Holding Company?

A. I was employed by the Guaranty Trust Company.

Q. Did you keep the books and records of the Yakima Holding Company?

A. I was bookkeeper. The Guaranty Trust Company had charge of the Yakima Holding Company books.

Q. When did you enter the employment of the Yakima Holding Company as bookkeeper?

A. When it was first organized—I couldn't tell the date of that.

Q. Well, approximately, was it prior to 1934?

A. Then, or thereafter. I don't know what date the Yakima Holding Company was incorporated now. If you look at the books— [179]

Q. Were you keeping the books of the Yakima Holding Company in August, 1934? A. Yes.

(Testimony of William Bradshaw.)

Q. How long after that did you continue to keep the books? A. Until July, 1937.

Q. At that time what was the occasion of your leaving?

A. I left the Guaranty Trust Company.

Q. Just explain to the Court what your duties were in connection with keeping the books.

A. Well, putting it the simplest way, I was the bookkeeper.

Q. Under whose direction did you make the entries?

A. Well, my father and also Mr. Ed Hoffman.

Q. What connection did Mr. Hoffman have with the Holding Company?

A. He was a stockholder. I don't know whether he was an officer or not. But he served as an auditor, you might say.

Q. Are the entries shown on plaintiff's Exhibit 11, page 39, in your hand writing?

A. Yes, they are.

Q. When did you make this entry, if you recall, after the entry of "J. D. Keck Revenue stamp re-transfer stock" the arrow pointing up to explanation of previous items, the words—"under letter dated 12/11/34 Alexander Miller agreed to exchange 5000 shares stock Sunshine Mining Company @ \$12 per share for 4000 shares stock Yakima Holding Corporation @ \$15 per share"? [180]

A. I would make that right on the first, or not later than the succeeding entry there.

(Testimony of William Bradshaw.)

Q. You had made the previous entry before you entered that item? A. Yes.

Q. That is dated May 1st.

A. That's right.

Q. The entry to which that statement refers was an entry made previous to May first.

A. Yes.

Q. You didn't leave any space there. Do you recall at whose direction you made that entry?

A. That would be under my father's direction.

Q. I will show you what is marked Plaintiff's Exhibit "10"—referring to the item 7/17 Y.F.N.B. 1000 shares—Sunshine Mining stock—check 7—7725—just explain what the sum \$7725 refers to.

A. That represents 1000 shares of Sunshine Mining Company stock.

Q. Charged to cash disbursements.

A. Yes.

Q. What does Y.F.N.B. refer to?

A. Yakima First National Bank.

Q. Is that the company to whom the check was issued?

A. Yes the check was in their favor.

Q. That has reference to the payee of the check?

Mr. Cheney: I object to that. That's the same question I asked Mr. Hardy and it was objected to at the time as not being proper——

The Court: I sustained the objection. There was no [181] evidence that Mr. Hardy had any book-keeping experience, and no knowledge of the meaning of initials or hieroglyphics of bookkeeping en-

(Testimony of William Bradshaw.)

tries. There is no evidence that he, personally, as an officer of either the bank or the Holding Company knew what the particular items of that entry meant. I will overrule the objection so far as this is concerned.

Q. Will you please explain the item appearing directly under that?

A. Y.F.N.B. five thousand shares Sunshine Mining Company stock, \$40,000.

Q. What does that mean?

A. A cash disbursement of forty thousand dollars for five thousand shares of stock.

Q. By the Yakima Holding Company?

A. Yes.

Q. Just who was the check paid to?

A. To the Yakima First National Bank.

Q. And the items, the two remaining items, one for \$6320, and \$5530, were also checks to the First National Bank? A. Yes.

Q. I show you plaintiff's Exhibits "13" and "14" which is the Yakima Holding Company's check book with the stubs of checks issued—are those checks in your hand writing on those stubs?

A. My father's hand writing.

Q. The check No. 345—348—349 and 350 are the checks referred to in Exhibit 10?

A. Yes, that's right.

Q. Then the check 347 is in favor of the Yakima [182] First National Bank for a thousand shares of Sunshine Mining Company stock—how was that

(Testimony of William Bradshaw.)

stock carried on the books of the Yakima Holding Company, in what account?

A. Well, turn to the ledger—Sunshine Mining Company stock——

Q. In this book here?

A. Yes—(Exhibit 12)—that is where these items were posted.

Q. What do you call this sheet?

A. This book here is the general ledger.

Q. That would be the stock ownership account of the Sunshine Mining Company stock.

A. Yes—this is Sunshine Mining Company stock.

Q. Owned by, according to the books—Yakima Holding Co.?

Mr. Cheney: Object to that as calling for a conclusion.

Objection sustained.

Q. This Sunshine Mining Company stock—is that carried on the asset side of “C”?

A. Yes, carried as an asset of the Yakima Holding Company on the books.

Q. I will ask you, Mr. Bradshaw, if at any time prior to talking with the Government Revenue agent along about a week ago at your home on Orcas Island, whether or not you had any knowledge whatever then, other than the stock of the Sunshine Mining Company was owned by the Yakima Holding Company?

Mr. Cheney: That’s calling for a conclusion—

(Testimony of William Bradshaw.)

the same as your Honor just sustained objection to.

The Court: As a bookkeeper acting under specific [183] direction of some one else the bookkeeper doesn't necessarily know the question of ownership. He knows what he is instructed to put down in the books. He wasn't a general bookkeeper acting without definite instructions from his superior officer.

Mr. Winter: I will reframe that question.

Q. Do the records of the Holding Company kept by you during all this time show any entry that stock was held or owned by the Holding Company, Sunshine stock was held by the Holding Company?

A. In the Sunshine stock account in the ledger the stock purchases were shown there.

Q. As purchased by the Yakima Holding Company. A. Yes.

Q. Is there any mention anywhere in the books of the Corporation that it is being held for the account of any one else? A. No.

Q. None whatever?

A. No, I don't believe so. It was purchased from the Yakima First National Bank.

Q. And carried on the books in this entry as stock of the Yakima Holding Company?

A. Yes.

Q. Will you refer to the Cash Disbursements Journal, page 21—of Defendant's Exhibit "D"?

A. What is it you wanted?

Q. Will you just explain the entry May 1st,

(Testimony of William Bradshaw.)

1935—read it to the Court and state what it refers to. [184]

A. Could I see the General Ledger first?

Q. At what page?

A. At page—its the reserve for stock investment account. It's this one here.

Q. Read the whole item.

A. "May 1, First Security & Loan Company, payment Reserve account in full, check 383, \$78,000". That money was paid out and it was debited to reserve for stock adjustment account.

Q. General ledger of what—

A. Yakima Holding Company—or Corporation, rather.

Q. That was for the purchase of what?

A. The First Security purchased Yakima Holding Corporation shares for \$16,785, which was for the Yakima Holding Corporation stock.

Q. Investment? A. Investment.

Q. The corporation invested that amount for its own stock? A. Yes.

Q. Who was it purchased from?

A. It was purchased from several—E. J. Tempke, 33 shares; E. H. Powell, 40 shares; Washington Nursery Company, 133 shares, and Katherine E. Van Slyke 13 shares, that is a total of 1119 shares, purchased at \$15 a share which totaled \$16,785.

Q. Now, turn to the Cash Receipts Journal at page 39 (Plaintiff's Exhibit 11). A. Yes.

(Testimony of William Bradshaw.)

Q. Explain the item shown there. [185]

A. That descripton here is a description of what this entry is for.

Q. Of the——

A. The Sunshine Mining Company stock, five thousand shares at \$12 which was a debit item in the Yakima Holding Corporation stock investment account—1119 shares at \$15 which was a credit of \$16,785.

The Court: Which means that you purchased enough of your Holding Corporation stock to make up the \$16,000 to pay to Mr. Miller for Sunshine stock? A. Yes.

Q. Sunshine at \$12 and Holding Corporation at \$15.

A. Mr. Miller got 4000 shares of Holding Corporation stock and those 1119 shares were purchased from these various stockholders and the remaining number of shares came out of the capital stock of the Yakima Holding Corporation.

Mr. Winter: That's all.

Cross Examination

By Mr. Cheney:

Q. You say you kept these books under the direction of your father? A. Yes.

Q. When the entries appear on these books in a certain way those were made at the instance of your father? A. Mr. Hoffman, also.

Q. Wasn't the only question you took up with

(Testimony of William Bradshaw.)

Mr. Hardy the question income tax at the end of the year? A. Not always. [186]

Q. Most of the time?

A. All of the entries I made in the books with reference to the 12,500 shares were made——

Q. Were made by you at the direction of your father? A. Yes.

Q. So far as you know, Mr. Bradshaw, you have no personal knowledge as to whether or not anybody ever bought any stock from the First National Bank?

A. You mean this Sunshine stock?

Q. Yes.

A. All I know it was purchased from them.

Q. How do you know that—because your father told you to make the entries on the book, Yakima First National Bank?

A. Well, the shares was issued to the First National Bank.

Q. All you know is the shares were issued——

A. Yes.

Q. And your father told you to make the entry in a certain way? A. Yes.

Q. Now in your father's instructions to you he told you, did he not, that the Holding Company had an understanding with the bank with reference to the purchase of the 7500 shares which was going to be purchased by the Holding Company, for the account of the bank, and in fact weren't you showed the letter he had signed himself so you could be correct in making your entries?

(Testimony of William Bradshaw.)

A. Yes, that was in relation to this entry
—— [187]

Q. That is the letter you referred to when you made the explanation of the entry in May in the Cash Disbursements Journal? A. Yes.

Q. However in keeping the books of the company your father told you to enter it as you have put it up there, and to put in the record Y.F.N.B. in front of or attached to the entry in reference to that account, didn't he?

A. Yes, it was set up that way.

Q. And that was at his instance? A. Yes.

Q. And when you opened the general ledger account, the account on your books called the Sunshine Stock Account, it was opened simply and only for that one particular deal—the 12,500 shares.

A. Yes that was all the stock that went into it.

Q. And you never had any account prior to that time? A. No.

Q. With the exception of that one transaction there never was any other transaction of Sunshine stock? A. No, that is all.

Q. When you came to opening the books in the general ledger and making the entries in Plaintiff's Exhibit 12, your father told you to put the entry of "Y.F.N.B.—1000 shares—\$7.72 $\frac{1}{2}$," and "Y.F.N.B. 5000 shares—\$9—\$40,000" and the balance of it—is that correct?

A. Yes, that was the entry. [188]

Q. Back in May when the Bank paid the Hold-

(Testimony of William Bradshaw.)

ing Company the first \$61,451.50 that was to repay the Holding Corporation for all the money it had in the 7500 shares, plus the write up and plus \$1.50 transfer charge, is that correct? A. Yes.

Q. And they paid you at the same time \$60,000 which was full payment, according to the agreement in your father's instructions—they paid you sixty thousand dollars which was full payment of the five thousand shares of Sunshine stock in accordance with their part of Exhibit "12" transaction and that was done with the express understanding the stock would be taken over by the bank at the stipulated price of \$12——

Mr. Winter: Just a moment—are you referring to Alex Miller's letter——

The Court: That's the only letter—he never saw this one——

Mr. Winter: The witness testified he saw this letter——

The Court: He testified that was the letter he saw. He testified the entry he made on May first was the result of Alex Miller's letter. Then he was shown Exhibit 19, and he said that was the letter on which he made the entry.

Mr. Winter: Let him look at the letter. Don't try to confuse him—and see if he ever has seen the letter before.

Witness: I believe this is the letter.

Q. Let's just go over this, Mr. Bradshaw—I don't [189] believe its quite clear. Now the Cash

(Testimony of William Bradshaw.)

Receipts Journal, Exhibit 11—now, let's take the entries—page 39—and check these items—. It was understood the stock should be purchased by the Yakima Holding Corporation to be reimbursed for anything actually paid for the stock, plus a small appreciation if that should be found necessary, or deemed necessary. Now, let's go back for a moment and check this out. Take the first item of May 1st, 1935, Yakima First National Bank, sale of 7500 shares Sunshine Mining Company stock, \$61,451.50—is there any place to show from where you got that money—or whose check that was? Now, look back to Exhibit 11—the item of cash receipts—it shows a receipt of \$61,451.50, does it not?

A. That's right.

Q. I now hand you exhibit 20, and will ask you if the check on there—the top one—isn't that check?

A. Yes, it is.

Q. Now, to be able to figure out the items that are contained to make up this check of \$61,451.50, will you look at exhibit "12" and see if it isn't a fact that that item was made up of the purchase price of 7500 shares of stock—and the item 25c write up or \$1875, and an item of \$1.50?

A. That would be right.

Q. That check, then, represents the entire account paid to the Yakima Holding Company on the 7500 shares—plus the two items, \$1875 and \$1.50.

A. Yes. [190]

Q. That's correct, isn't it?

A. Yes.

(Testimony of William Bradshaw.)

Q. Now, the next item on Cash Receipts is the sum of \$60,000, is it not? A. Yes.

Q. Now, that reads "Yakima First National Bank sale of five thousand shares stock, Sunshine Mining Company, @ \$12 per share".

A. Yes, that's right.

Q. Now, I will ask you if your father didn't show you the letter (Plaintiff's Exhibit 19—December 12) and tell you at that time—read the second paragraph now——

A. This letter you presented me is December 12th——

Q. I am asking you about this \$12 per share—\$60,000—I am asking you to check that entry——

Mr. Winter: I submit his question is unfair——

The Court: We are trying to find out what the bookkeeper's entry means. Objection overruled.

A. The explanation under Letter dated 12/11/'34 Alexander Miller agreed to exchange stock, 5000 shares of Sunshine Mining Company stock at \$12 for four thousand shares of Yakima Holding Corporation at \$15.

Q. That is an explanation of an item I didn't call your attention to. The item I am referring to is the item below that—Yakima First National Bank sale five thousand shares Sunshine @ \$12—\$60,000—I am asking you if that isn't the item exactly referred to, which letter was showed you, and you followed instructions [191] in reference to it—

(Testimony of William Bradshaw.)

that letter of December 12th which I asked you to read.

A. You are referring to this \$60,000?

Q. Sixty thousand dollars.

A. This would be the explanation of that \$60,000 evidently—now—let's see——

The Court: Who put that on there?

A. This is my writing here—this is my entry here——

The Court: Why, if this was the explanation of the \$60,000 did you put the arrow up above it——

A. That's what I was wondering——

The Court: Don't let the lawyers confuse you. Try to figure out where you got the information from from which you made that entry.

A. It was on my father's instructions I made that entry.

The Court: Look at that letter of December 11th and see if there is enough information in that letter to have enabled you to have made the entries.

A. That would be the letter, then, because this is of the same date.

Q. Where is there anything in that letter that would enable you to know it was to be exchanged at \$12 per share and \$15 per share—what they are trying to get at is to find out whether you ever saw this letter before (Exhibit 19). Is there any other trace of this transaction you could find which otherwise than the letter of December 11th you could have used to have acquired the information from

(Testimony of William Bradshaw.)

which you made this [192] explanation "to exchange 5000 shares stock Sunshine Mining Company @ \$12 for 4000 shares Yakima Holding Corporation at \$15"?

A. It appears there must be a letter there for the information—although this is evidently an error in the date of the letter because from this letter here I couldn't have made this entry here (referring to "18") but I could from this letter ("19").

Q. Do you think you ever saw this letter before? (Referring to "19").

A. You see my father was Secretary and he kept such papers as this, and in case of any information he would give the information which I would take down on a scratch pad of paper for my information, and then make my entry in the book.

Q. When you made the notation in the book to the effect you got the information from a letter—its perfectly all right—don't hesitate to say you did if you did—that you got your information from a letter when as a matter of fact your father took the information from the letter and transmitted it to you without showing you the letter.

A. The way he would often do—he would hold the letter before me so I could get from it what information I would desire, then as soon as I got that information he would take the letter and place it where he kept them.

Q. Now, this Yakima Holding Corporation stock investment account——

(Testimony of William Bradshaw.)

A. There would be an account here with that same [193] name (Exhibit "C")—that was an account opened and closed the same day—you see it refers to 1119 shares of stock.

Q. You opened that as an investment account?

A. Yes, in which the Yakima Holding Corporation held 1119 shares of their own stock.

Q. You didn't make a similar distribution on your book here but just showed it by that notation because of the fact here was only one transaction, is that right?

A. That's right, yes. You see its also on this other journal here—this entry here of debits—there's an entry of the same amount here you see. This is a debit entry and this is a credit entry which takes it off the books.

Q. During the time you were there was there any time when the Holding Company held assets in trust for anybody else for or on behalf of anybody else?

A. Well there was for certain notes they held for a short time—then of course the bank stocks—are you referring to that?

Q. No. I am talking about—did you have any account in the Holding Company where the Holding Company was holding the assets, or where they had money in the bank they were simply holding in trust for somebody else, or on behalf of somebody else?

A. No, because you see the Yakima Holding Corporation books were in complete balance all the time.

(Testimony of William Bradshaw.)

Q. What I wondered where—whether or not there was any other account in which this Sunshine Mining stock [194] transaction——

A. That would be the only account in the Yakima Holding Corporation books.

Q. You didn't have trust accounts of any kind?

A. No—this was the account here.

Mr. Cheney: Q. Now, on page 49—this item of \$60,000 received on the date of May 1st——

A. Yes.

Q. Calling your attention to a check for—cashier's check for \$59,005 in Exhibit 20, and ask you if that isn't the check to which you referred and made this entry of.

A. Yes, it evidently is, all right.

Q. That is the entry? A. Yes.

Q. The total of those two checks is \$121,451.50.

A. Yes.

Q. That would be the total of the Sunshine stock account in the general ledger and the only one in front of you now.

A. Yes. Well, there is another item in there—revenue stamps——

Q. That has nothing to do with this case. You see——

A. You see, Joe, this check here—this total in red figures is the total of all of these checks and all of this money here isn't——

Q. \$121,451.50 is the same debit you applied in the General Ledger to balance out any interest the [195] Holding Company had in Sunshine stock.

(Testimony of William Bradshaw.)

A. That is right.

Q. Outside of the information given to you by your father or from reading the letters and from the two checks that constitute Exhibit 20, you had no information whatever as to what was the sale price of the stock unless that was the sale price of the stock? A. No, I did not.

Q. So that on your books it appears that the Yakima Holding Corporation sold to somebody 12,500 shares of Sunshine stock on May 1st, 1935, for a total consideration of \$121,451.50.

Q. Yes, there was that much received in.

Q. As far as the books show. A. Yes.

Q. Now, the truth of the matter is those two items constitute just the cost of the Sunshine stock of the Yakima Holding Corporation—and a 25c write-up. A. Yes.

Q. Now, one other thing—every place on the books of the Holding Company where there is any reference to those 12,500 shares of stock, or any part of it, whether purchase, or sale, or anything else, it is tied in with the initials 'YFNB'.

Mr. Winter: I object—that is not a fact——

Mr. Cheney: I am referring to all three books, regardless of what it is, in evidence, or where this stock is referred to—— [196]

The Court: Go ahead and ask him. So far as the Cash Disbursements it can't mean anything because he did it in every instance.

Q. In every record you have, including the cash

(Testimony of William Bradshaw.)

disbursements journal—wherever this stock, or any reference to it is made in the books you have consistently attached to the entry ‘Y F N B’—either in initials or letters—that is true, is it not?

A. Yes, it is prefixed by those letters.

The Court: Now in your general ledger if you had not set up a special account for the Sunshine Mining stock where would you have put that—if you didn’t open up a new distribution where would you have put it?

A. My instructions were to open such an account. Excuse me, what was that question again?

The Court: If you hadn’t opened up in your journal-ledger an account entitled Sunshine Mining Stock account, which is plaintiff’s exhibit ‘12’ here and you would put it into any account you had opened up, where would you have put it? Aside from your instructions where would you have put it?

A. You could in a case like that, if not given any specific instructions on stocks that were going to be purchased and sold from time to time and not being held indefinitely, you have the stock investment account, but that would be improper here.

The Court: On August 17th, 1934, you didn’t have any place in the general ledger—you had to open up a new account. [197] A. Yes.

Mr. Winter: Does the witness consider that an investment account that you did open up?

A. That would be an investment account.

(Testimony of William Bradshaw.)

The Court: If these were assets of the Holding Company, owned by the Holding Company why did you insert the initials YFNB before them when you set up the special account which is 'Plaintiff's Exhibit 12'?

A. Well, those were my instructions to set them up in that manner.

Mr. Cheney: Instructions from whom?

A. My father.

Q. (By Mr. Winter) Would it be customary to put the name from whom you purchased the stock in that account?

A. Yes, that would be, also.

Q. You did that thruout all your records?

The Court: Where is your real estate account—did you have a real estate account?

A. Yes, there is one there. Here is the real estate—now here you see, for instance, at that time here is the total amount of the real estate the Yakima Holding Company had, and as it was purchased and sold I took the red ink pen in order to make it clearly discernible to any person else, and also myself, when an item was taken out——

The Court: In your real estate account your first item shows you purchased \$200,000 worth of real estate. Items eight to twelve you sold certain lots——

A. Yes—Rankin made two payments—— [198]

The Court: In every instance where you either purchased something from somebody or paid paper

(Testimony of William Bradshaw.)

men or material men you showed the names of the firm from whom you purchased it. A. Yes.

Q. Or material or labor you paid for in your real estate account. A. Yes.

Q. The same as is shown here this was purchased from the Yakima First National Bank?

A. Yes, that is to whom the check was issued.

Mr. Cheney: And you say the reason for the way the accounts were carried in so far as this transaction is concerned was following out the instructions of your father, George H. Bradshaw.

A. Yes.

Q. The Court asked you if that account had not been opened where would you have put it—isn't the answer to that you would have asked your father as to where you should put it and opened the account according to his directions?

A. Yes.

Q. You wouldn't have put it any place until you consulted your father and found out where it should be put.

A. No, if I had had to determine myself I would have placed it in this stock investment account.

Q. Would you have done that if you had had to determine it yourself or examined the letter and opened up an account that reflected the information as contained in [199] the letter, Exhibit '19'?

Mr. Winter: Object to that—calling for a conclusion of this witness——

Objection sustained.

(Testimony of William Bradshaw.)

The Court: The question you should ask him is whether or not he would insist on finding out more information about it—that's what most people would do.

Mr. Cheney: I asked him if he would have done anything until he asked his father—he added on 'if I had to make up my mind myself' or something to that effect.

Q. You have exhibit '19' in front of you, and if you were making an entry to reflect the purchase of the 7500 shares and the 5000 shares as referred to in that letter—how would you have opened up the account?

A. I would have done it in the manner in which it was done—opened up an account for the Sunshine Mining Company account.

Q. You would have opened up an account exactly as it was if you were doing it yourself following the letter, Exhibit 19, you have in your hand?

A. At that time, of course, I was instructed by my father as to how to set the account up.

Q. The only reason I am asking this question is on account of the answer you made to his Honor's question—you do have the exhibit in front of you, will you kindly read it and answer the question on your own responsibility, if you had not had any instructions how would you have opened an account on your books reflecting the instructions in Exhibit 19 before you? [200]

(Testimony of William Bradshaw.)

Mr. Winter: I don't understand the question.

The Court: Do you understand the question?

A. Yes, I believe I do. Well, I was guided by my father's instructions.

Q. To you? A. Yes.

Q. After reading that letter you don't know what you would have done if you hadn't had any instructions? You would not have done anything until you got instructions, is that it? A. No.

Q. Could I put it this way? That letter says the 7500 shares and the 5000 shares of stock was to be the property of the Yakima First National Bank held by the Holding Company?

A. Yes.

Q. And the Holding Company was to be reimbursed the amount of money it paid out—plus appreciation. A. Yes.

Q. Now, if you were going to set that entry up in your books would you have set it up any differently than you did the special account with the initials Y F N B in front of it.

Mr. Winter: I object to that——

Objection sustained.

Witness excused. [201]

F. V. GLAETZNER,

a witness called for and on behalf of the defendant,
having been duly sworn, testified as follows:

Direct Examination

By Mr. Winter:

Q. State your name, please.

A. F. V. Glaetzner.

Q. Where do you reside? A. In Yakima.

Q. What is your business or occupation?

A. Banker.

Q. With what bank are you connected?

A. At the present time the National Bank of
Commerce.

Q. In what capacity?

A. Assistant cashier.

Q. Were you connected with the Yakima First
National Bank during the years 1934 and '35?

A. I was.

Q. What was your connection with the Yakima
First National Bank?

A. Assistant cashier.

Q. I will show you what has been marked as
Defendant's Exhibit 'A' for identification, and ask
you whether or not you recall having seen the orig-
inal of those receipts?

A. I couldn't say definitely—this one bears my
writing here.

Mr. Winter: (To Mr. Cheney) Mr. Cheney, I
asked the liquidator to produce—— [202]

Mr. Cheney: You asked just before adjournment

(Testimony of F. V. Glaetzner.)

of Court. I haven't had time to find them. I haven't found them and I don't know whether they exist or not.

Mr. Winter: The witness said they had been destroyed——

Mr. Funk: I did not, and you know it.

Mr. Winter: I don't know how I could be mistaken. Have you made an effort to locate them?

A. Yes sir.

Q. And have been unable to find them?

Mr. Funk: Yes sir.

Q. (Continuing with the witness on the stand) The words 'Yakima Holding Corporation' are written in your hand writing. A. Yes.

Q. Do you recall when you wrote those words on there?

A. Presumably about that time. I am going by the records.

Q. Do you have any independent recollection of having on behalf of the First National Bank received from the Yakima Holding Corporation 7500 shares Sunshine Mining Company stock about April 16th, 1935?

A. I couldn't say definitely.

Q. I will show you what has been marked for identification Defendant's Exhibit 'B'—does that paper contain your signature? A. Yes.

Q. And all the writing thereon is yours?

A. Yes.

(Testimony of F. V. Glaetzner.)

Q. Does the bank keep a copy of the receipts in due course of business? [203] A. Yes.

Q. Do you know where these are at the present time? A. I do not.

Q. Were they part of the records turned over to the liquidator? A. I couldn't say.

Q. Does that exhibit refresh your memory as to whether or not you received the Yakima Holding Company stock referred therein?

A. I would say I received that from Mr. Hoffman under his instructions.

Q. And you issued the receipt?

A. This is my receipt.

Mr. Winter: We will offer in evidence defendant's Exhibit 'A' and 'B'. I am sure Mr. Cheney is not going to take the position they are not the originals because he has the originals issued in his own possession, if they are in existence.

Voir Dire

By Mr. Cheney: Do you have any knowledge or recollection or information at all of any transaction, anything about it except apparently something was in your hand writing?

A. That's true.

Q. And whether or not such a receipt as that, if there ever was one was actually delivered to anybody you don't know that.

A. I couldn't say.

Q. You don't know whether or not that was

(Testimony of F. V. Glaetzner.)

ever a receipt that represents the receipt or transfer of anything else, of any property. [204]

A. No.

Q. Do you know whether or not you ever did anything with reference to this or whether somebody else did it?

A. I have no positive recollection of the transaction. I presume at one time this either acted as a receipt or was held as a memorandum with the stock.

Q. Mr. Hardy testified he personally delivered the shares of stock in question to Mr. Spencer for the Yakima First National Bank—now do you know anything about that?

A. I wouldn't doubt that at all.

Q. But do you know anything about it personally? A. No.

Q. Now with reference to the paper called Exhibit 'A' outside of the fact you believe that is in your hand writing on the middle one of the three receipts, you know nothing about what this represents?

Mr. Winter: He said it was his hand writing.

A. Well, that's a receipt, apparently, for stock—

Q. Have you a personal recollection?

A. I have not of the individual transaction.

Q. You are certain there was a receipt like the middle on—6519—and you are certain you wrote on this hand writing below.

A. That's my hand writing.

(Testimony of F. V. Glaetzner.)

Mr. Cheney: I've no objection for what they are worth.

Defendant's Exhibits 'A' and 'B' for identification received in evidence.

[Printer's Note: Defendant's Exhibits A and B are set out at pages 440-441 of this printed record.] [205]

Q. (By Mr. Winter) Was it the custom in all cases to issue receipts when the bank would receive stock for sale from some customer?

A. Yes.

Q. You didn't ever issue any receipt for any stock you didn't receive personally, did you, at the bank? A. No.

Q. If this is a receipt of yours you wrote you would have received the stock, but in answer to counsel's question you said you did not have an independent recollection of this particular transaction.

A. Not of this particular transaction.

Q. You noticed, did you, Mr. Glaetzner, that the receipts on Exhibit 'B' and Exhibits 'A' refer to the same certificate numbers, and of course you must have received the certificate 6519 into your possession to write on it.

A. At one time I must have had it.

Mr. Winter: That's all.

(Testimony of F. V. Glaetzner.)

Cross Examination

By Mr. Cheney:

Q. Mr. Glaetzner, in drawing up the receipts you drew up the receipt and delivered it to Mr. Hardy, Mr. Hoffman and Mr. Rightmire, is that right? A. Yes.

Q. Also when any moneys came back you ordinarily and customarily delivered that money to them, didn't you? A. Yes.

Q. Now in giving out receipts it might represent [206] something delivered to you or Mr. Hardy or Rightmire or Hoffman. A. Thats true.

Mr. Cheney: That's all.

Re Direct Examination

By Mr. Winter:

Q. You mean delivered to somebody there in the bank? A. Yes.

Q. You weren't issuing receipts personally for stock that wasn't delivered—that you know had not been delivered—you would have to know.

A. I might have done the mechanical end of it—issued receipts that I knew were in the possession of the bank.

Mr. Winter: That is all.

Witness Excused.

ANTHONY J. COOKE,

a witness called for and on behalf of the defendant,
having been duly sworn testified as follows:

Direct Examination

By Mr. Winter:

Q. State your name please.

A. A. J. Cooke.

Q. Where do you reside?

A. San Marino, California.

Q. What is your occupation?

A. National Bank Examiner.

Q. How long have you been National Bank Examiner?

A. I was commissioned in July, 1927.

Q. You have been National Bank Examiner ever since? [207]

A. Thats correct.

Q. Calling your attention to the Yakima First National Bank were you instructed to examine that bank in 1934?

A. Yes.

Q. How many times did you make an examination in 1934?

A. Between April, 1934, and June, 1935, I made three examinations of the Yakima First National Bank.

Q. When was the first examination?

A. May 7th, 1934.

Q. And the next examination?

A. December 14, 1934.

Q. Who was with you?

A. On each visit I had an assistant.

(Testimony of Anthony J. Cooke.)

Q. Do you recall who assisted you in December, 1934? A. F. D. Arnold.

Q. Where is he now?

A. He is located in Yakima.

Q. Is he a National Bank Examiner?

A. No.

Q. He has since left the service?

A. He has.

Q. How long ago did he leave? A. In '35.

Q. When did you start your examination of the Yakima First National Bank in December, December 14th, 1934?

A. At eight in the morning on the 14th.

Q. During that examination did you also examine the Yakima Holding Corporation?

A. I did not.

Q. Did you make an investigation of the Yakima Holding [208] Corporation—

A. I made a request for a statement of conditions of the Yakima Holding Corporation as of the close of business December 13th, 1934.

Q. Did your examination or investigation show whether the Yakima Holding Company owned any stock in the Sunshine Mining Company at that time?

A. The statement submitted to me disclosed that the Yakima Holding Company was the owner of 7500 shares.

Objected to as not the best evidence.

Objection sustained.

(Testimony of Anthony J. Cooke.)

The Court: I shouldn't sustain it at this state of the record——

Mr. Cheney: I move the answer be stricken.

The Court: Motion granted.

Q. Did you keep the statement furnished to you, the balance sheet? A. I did.

Q. What did you do with it?

A. It was subsequently destroyed.

Q. Who destroyed it? A. I did myself.

Q. Can you state to the Court what it contained with respect to any Sunshine Mining Company stock?

Mr. Cheney: Just a minute—thats not the best evidence—there has been no proper foundation laid for secondary evidence of any kind.

The Court: When did you destroy it?

A. At the end of 1935.

Q. (Mr. Winter): Was that after the liquidation of [209] the bank? A. It was.

Q. After it had been sold?

A. After the business of the Yakima First National had been sold. The files which were in our office—Spokane office—were destroyed—they were burned.

The Court: Do you know whether there were ever any copies of it?

A. I couldn't say—I asked for one copy.

The Court: Have you ever made an effort to get from the plaintiff——

(Testimony of Anthony J. Cooke.)

Mr. Winter: It was furnished to the National Bank Examiner and the record was burned.

Mr. Cheney: The trouble is, your Honor, we now have purely a conclusion of what was in it—what it reflected—and not the specific details of the course in which it was carried—what it included or what was involved in it.

Mr. Winter: I simply asked him what it showed with reference to the Sunshine Mining Company stock—not whether it showed debits and credits.

Witness: Accompanying that statement was a complete detail of the assets reflected by that statement.

Q. Was any Sunshine Mining Company stock shown as an asset of the Yakima Holding Company? A. It was.

Mr. Cheney: Object to this secondary evidence.

The Court: What was the nature of the showing as to the assets—you got an ordinary statement as of that date? [210] A. Yes.

Q. What were the supporting documents—whatever they were, to show the assets?

Q. There were half a dozen entries covered in this statement—called ‘Bills Receivable’, ‘Accounts Receivable’, ‘Investment in Bank Stock’, ‘Other Investments in real estate’ and so on. I asked for a complete list of these assets which were furnished me.

Q. You looked over the statement—

A. They gave me a detailed statement of all the assets of the Yakima Holding Corporation.

(Testimony of Anthony J. Cooke.)

Q. It was gotten up by——

A. One of the employees of the Yakima Holding Corporation—who prepared the statement I don't know.

The Court: I have frequently expressed my opinion of the Comptroller's office for destroying anything—but it has always been the policy of that office to destroy banking papers as soon as they can apparently—I will overrule the objection.

Q. Will you state to the Court what that paper that was furnished to you showed with reference to the ownership of the Sunshine Mining stock?

A. That was a statement of the condition and the accompanying schedule that carried the details of those assets showed that the Yakima Holding Corporation was the owner of 7500 shares of the Sunshine Mining Company.

Mr. Cheney: He says it showed it was the owner—that must become a conclusion of the witness as to what was said—not as to what it stated.

[211]

The Court: He stated they gave him a financial statement and that showed certain assets and he asked for a detailed statement as to those assets. Now a financial statement showing assets with a subsequent detailed statement showing the type and name of the asset is not a conclusion—everybody knows what a statement shows.

Q. In other words, it was shown as an asset 7500 shares—that was shown on that schedule as an asset of the Yakima Holding Corporation.

(Testimony of Anthony J. Cooke.)

A. That is correct.

Q. Was there an item showing a liability for the stock?

A. The Yakima Holding Company did show liabilities.

Q. I mean liability to any one else for that stock.

A. There was an obligation reflected by that statement owing to the Yakima First National Bank of approximately \$60,000.

Q. That was true up until your last examination of June, 1935, is that right?

A. The Yakima Holding Company owed approximately a similar amount until at the time of my examination in June, 1935.

Mr. Cheney: Are you testifying to another statement now?

A. I answered the question that was put to me.

Q. When was the first time you examined the Yakima First National Bank?

A. As of the close of business May 7, 1934. [212]

Q. That was the first examination you ever made?

A. That was the first.

The Court: Did you examine the other two banks that were consolidated—were you thru this territory all the time, or was that your first visit here?

A. That was my first visit here in 1934.

Mr. Winter: Q. Did you have any conversation with Mr. Hardy or Mr. Rightmire with refer-

(Testimony of Anthony J. Cooke.)

ence to the bank's assets, the condition of the assets of the bank?

Mr. Cheney: At what time?

Mr. Winter: During 1934 and '35.

A. At my first examination in May I completed the examination and discussed with them the general condition of the bank.

Q. Discussed it with whom?

A. With the senior officers of the bank.

Q. What did you say to them?

A. As a result of my findings I recommended that the bank undertake to strengthen its capital structure. My recommendation was this: that the bank apply for \$200,000 of preferred stock—the application to be made to the Reconstruction Finance Corporation. At the same time the recommendation was made that they—that the common capital structure be reduced in a like amount to make funds available for the removal of objectionable and sub-standard assets.

The Court: What was the capital?

A. Five hundred thousand dollars. There was one hundred and twenty thousand [213] surplus, and in the neighborhood of one hundred thousand in undivided profits. In round figures the bank had a capital structure of approximately seven hundred thousand.

Mr. Winter: Q. When you say you 'recommended'—you mean you stated that to the officers of the bank?

(Testimony of Anthony J. Cooke.)

A. To the officers only, I didn't discuss it with the board of directors.

Q. Did they say anything to you with respect to that when you said that to them?

A. An application was filed shortly thereafter with the R.F.C. The bank was notified that those funds of \$200,000 were available.

Q. When was that—you were there in May—would you say that was in June?

A. I can only say shortly thereafter.

Q. When was the next time you made an examination of the Yakima First National Bank and its holding company, the Yakima Holding Company?

A. The second time I made an examination of the Yakima First National Bank was on the morning of December 14th as of the close of business December 13th, 1934.

Q. During the examination was there any intervening Sunday? A. Yes.

Q. Did you have any conversation with Mr. Hardy or Mr. Rightmire or any officer of the bank with respect to the condition of the bank at that time?

A. As a result of my findings on the examination in December I recommended that the bank increase their contribution from \$200,000 to \$300,000. [214] As a means of removing certain objectionable assets there was a program submitted which provided for the consolidation of the Yakima First National Bank and the First National Bank of

(Testimony of Anthony J. Cooke.)

Wapato and the Guaranty Trust Company—those banks were to be merged. In addition the Yakima Holding Corporation was to contribute cash to the extent of three hundred thousand dollars. That program, if it had been complied with permitted the removal of the assets we wanted removed from the bank.

The Court: Was that in the nature of a counter proposal to your proposal?

A. I submitted that proposal in my reported examination and I merely set forth what the bank proposed to do to remove objectionable assets.

Mr. Cheney: That was your recommendation what you have testified to about the consolidation?

A. The only recommendation I made with respect to the strengthening of the capital was in my examination of May 7, 1934, when I recommended the bank sell \$200,000 of preferred stock to the R.F.C.

Mr. Winter: Q. When you say 'recommended' you mean you so advised the bank's officers and directors?

A. Not the directors. I didn't call a meeting of the Board of directors.

Q. You stated that to Mr. Hardy, did you?

A. I did to Mr. Hardy.

Q. That was in May of 1934.

A. Thats the only recommendation I made with respect to the strengthening of the capital of the bank. [215]

(Testimony of Anthony J. Cooke.)

Q. You mean by selling preferred stock to the R.F.C.

A. It was our only avenue of help at that time.

Q. Then, as I understand it, the R.F.C. approved the application for a loan.

A. It was not a loan.

Q. Well, for the purchase.

A. The R.F.C. agreed in writing to purchase \$200,000 of preferred stock to be issued by the Yakima First National Bank.

Q. Did the bank ever issue the stock or ever sell it?

A. It was never issued.

Q. Did you have a conversation with Mr. Hardy about that?

A. I did.

Q. Well, just state where and when the conversation was—was that at the time of the second examination in December?

A. The preferred stock was discussed at the examination in May of 1934. I indicated to Mr. Hardy that the objectionable assets threatened an impairment of the capital. I was informed there was no money available locally. I then recommended the bank undertake to strengthen its capital by the sale of preferred stock to the R.F.C.

The Court: You say in addition to that you recommended \$200,000 change in the common stock structure.

A. That's true.

Q. So you recommended the two things.

A. Yes.

(Testimony of Anthony J. Cooke.)

Q. Then as I understand it you went in there for another examination on December 14, 1934.

[216]

A. Yes.

Q. After your examination you had a conference or discussion with Mr. Hardy?

A. I did.

Q. Relative to the capital structure and the doubtful assets which you found at that time.

A. I did.

Q. What was said by Mr. Hardy and what was said by you?

Mr. Cheney: Was Mr. Hardy the only person present?

Mr. Winter: I am referring to the plan that was submitted.

Q. Will you state what you said and what Mr. Hardy said—tell the court exactly what happened.

A. At the conclusion of my examination on December 18, 1934, I told Mr. Hardy he should raise three hundred thousand rather than two hundred thousand—Mr. Hardy then told me his plan to raise these funds provided for a consolidation with the Yakima First National Bank of the Guaranty Trust Company and the First National Bank of Wapato. His plan also provided that the Yakima Holding Company would contribute cash to the extent of three hundred thousand dollars. That program if complied with would have permitted the removal of the doubtful assets which we were insisting should be done, sub-standard assets.

(Testimony of Anthony J. Cooke.)

Q. If I understand you Mr. Hardy then stated that it was the sale of the contemplated three hundred thousand dollars of sub-standard assets which the Holding Company was going to purchase. [217]

A. In connection with the three hundred thousand I was informed by Mr. Hardy he had cash in sight of one hundred and twenty thousand and that he would be able to raise the balance of one hundred and eight thousand—I closed my report and incorporated in the report—which was mailed to the directors of the bank—setting forth these proposals.

Q. Did Mr. Hardy mention anything about Sunshine Mining stock at that time?

A. At no time between December 14 and December 18 did any director or officer of the Yakima First National Bank inform me that the Yakima First National Bank owned any stock in the Sunshine Mining Company.

Question Read:

The Court: Answer the question. That isn't an answer to it.

A. No.

Q. When did you next talk with Mr. Hardy about the condition of the bank or anything in connection with your examination which you made in December, 1935.

A. On or about April 4, 1935.

Q. Where were you?

A. At my home in Spokane.

(Testimony of Anthony J. Cooke.)

The Court: Where did he say he was going to get the \$120,000?

A. From individuals interested in the welfare of the Yakima First National Bank.

Q. Did he say who they were?

A. Mr. Miller's name was mentioned, Mr. Hardy's own [218] name was mentioned—the third party—I can't recall the name.

The Court: Did you make an effort to find out if Mr. Miller was in Yakima at that time?

A. I did not.

Q. You made no effort to find out whether Mr. Miller would——

A. I did not except as Mr. Hardy informed me.

Q. Did you make an effort to find out who the other man was? A. I did not.

Q. How much was he going to put up?

A. The three individuals——

Q. How much was Mr. Hardy to put up?

A. Fifty thousand dollars.

Q. And how much Mr. Miller?

A. Fifty thousand dollars.

Q. And the other man was going to put up twenty thousand dollars?

A. I don't know who was putting up the twenty thousand dollars.

Q. Mr. Miller was vice president of the bank?

A. He was.

Q. Was he there in the bank?

A. He wasn't active in the bank?

(Testimony of Anthony J. Cooke.)

Q. Was he in there during the examination?

A. I didn't see him.

Q. Did you make any inquiry as to whether you could find this other man who was putting up the \$20,000? [219]

A. I did not.

Mr. Winter: Q. Did you report to the Comptroller the plan that was submitted to you substantially as you have testified?

Mr. Cheney: Object to that as irrelevant, incompetent and immaterial.

The Court: Objection sustained.

Q. You talked to Mr. Hardy about April 4th, you say?

A. April 4th, 1935, I did.

Q. Who was present?

A. Mr. Hardy and myself.

Q. At your home in Spokane?

A. Yes, in Spokane, Washington.

Q. Will you relate to the court the substance of that conversation?

A. Mr. Hardy submitted a plan to strengthen the capital of the bank—the plan submitted was relayed to the Chief Examiner—

Mr. Cheney: That is wholly immaterial and not responsive.

Q. Don't state that—what did you say and what did Mr. Hardy say to you at that time?

A. Mr. Hardy spoke of 17,500 shares of Sunshine Mining stock which he wanted to place among the assets of the Yakima First National Bank, at a book value of \$218,750. In discussing the plan

(Testimony of Anthony J. Cooke.)

with Mr. Hardy I told him I couldn't approve of the plan that we put stock of the Sunshine Mining Company in the assets of the [220] Yakima First National Bank.

Q. What further was said?

A. I submitted Mr. Hardy's proposal—

Mr. Cheney: I object—hearsay—

Q. Was anything else said between you and Mr. Hardy? A. Nothing.

Q. Did you say anything to Mr. Hardy whether you would submit it, or what you would do about it?

A. I told him I wouldn't join in any program that would put Sunshine Mining Company stock into the assets of the Yakima First National Bank.

The Court: I don't see any objection to his testifying he submitted it—that's a different matter than 'relaying' the information.

Mr. Winter: I don't want to overstep the bounds—

The Court: He has to show what was done if his testimony is to be of any value. The question of whether or not he submitted it isn't hearsay—he knows whether he did, or not, so if you are holding back because you think I would sustain an objection to it—I will not.

Q. What did you say to Mr. Hardy with respect to the program he submitted?

A. At Mr. Hardy's request his proposal was submitted to the office of the Chief National Bank Examiner in San Francisco. The letter was closed

(Testimony of Anthony J. Cooke.)

with the request that it be answered immediately.

Q. Did you receive a reply to that?

A. I received a reply to the letter while I was engaged in work in Wenatchee, Washington. [221]

Q. Did the bank examiner permit the bank to take it in, or not?

Mr. Cheney: I object to what the bank examiner did.

The Court: Well, its just one other step.

Q. Did you report to Mr. Hardy as to whether or not——

A. On receipt of the reply from the Chief Examiner in San Francisco I called Mr. Hardy by telephone.

Q. Where were you then?

A. I was in Wenatchee, Washington.

Q. How much longer after April 4th would you say it was? A. From four to six days.

Q. Where did you call him?

A. At Yakima, Washington, Yakima First National Bank.

Q. Did you have a conversation with him over the 'phone? A. I did.

Q. Relate what you said to him and he said to you?

A. In my conversation with Mr. Hardy I indicated I had had a reply from the Chief Examiner who wasn't willing to go along on his proposal in connection with the stock of the Sunshine Mining Company. I further suggested to Mr. Hardy he

(Testimony of Anthony J. Cooke.)

proceed with selling the preferred stock to the R.F.C.

Q. What did Mr. Hardy say to you?

A. As I recall my remarks about the preferred stock closed the conversation by 'phone.

Q. Did you have any other conversations about that time with Mr. Hardy? [222]

A. Not until on or about June 9, 1935, I talked to Mr. Hardy.

Q. Where?

A. At Spokane, Washington, by long distance telephone call. Mr. Hardy called me by 'phone.

Q. Mr. Hardy called you from Yakima?

A. I could say it was a long distance telephone call—I do not know where Mr. Hardy was at the time.

Q. Did you recognize his voice? A. I did.

The Court: You were in Spokane?

A. I was.

Q. (Winter): Relate the conversation over the telephone at that time.

A. Mr. Hardy told me he was making plans to attend the graduation exercises of his son at West Point—and because of the conversation I deferred any examination—

Q. Just state all that Mr. Hardy said and you said, the best you can.

A. Mr. Hardy informed me in that telephone conversation that all the assets classified as doubtful in the report of the examination of December

(Testimony of Anthony J. Cooke.)

14 had been removed from the bank. In response to my query as to the manner in which this cash was raised Mr. Hardy assured me that the money had not been stolen.

Q. What words did he use if you recall? What does he call you, ordinarily?

A. By my first name, Johnny.

Q. Well, how did he say it? [223]

A. His remarks were to the effect he hadn't stolen the money that made possible the elimination of this objectionable assets.

Q. Was there anything further said as to how the money had been raised? A. No.

Q. Was that all of the conversation over the phone with relation to that matter?

A. That was all.

Q. When did you next make an examination or see Mr. Hardy?

A. I next examined the bank June 24, 1935, and saw Mr. Hardy at that time.

Q. Did you have any conversation with Mr. Hardy or Mr. Rightmire about the transaction at that time involving Sunshine Mining Company stock?

A. Not knowing when I entered the bank—
Objected to—not responsive.
Question withdrawn.

Q. Now at that time did you start to make an examination of the bank? A. I did.

Q. Did you have a conversation with Mr. Hardy

(Testimony of Anthony J. Cooke.)

about the item of the sale of Sunshine Mining stock or the elimination of the assets?

A. We had a discussion in connection with the elimination of those assets?

Q. Who was there? [224]

A. As I recall my meeting with Mr. Hardy was alone.

Q. Did you at that time discuss anything about it with Mr. Rightmire?

A. During the course of the examination I undoubtedly discussed the elimination and the manner in which they were eliminated with Mr. Rightmire.

Q. What was your conversation with Mr. Hardy, the best you can recall of it, with respect to the elimination of these items—what was said between you and he?

A. I checked the transactions on the bank's books that permitted the elimination of these questionable assets, and in the records of the bank I found between April 30th and May 2d, 1935, that 11,000 shares of Sunshine Mining stock had passed thru the bank's books. My investigation further disclosed that the Yakima First National Bank approximately paid \$122,000 for 11,000 shares of Sunshine stock to the Yakima Holding Company. I further found there existed several letters, one addressed to the Yakima First National Bank by the Yakima Holding Corporation, under date of December 12, 1934, and a letter under date of December 24, 1934, and a letter under date of December 12, 1934, signed by Alex Miller.

(Testimony of Anthony J. Cooke.)

Q. Are you making reference to Plaintiff's exhibits 18 and 19—are these the letters you say you found?

A. These are the letters. During that time I pointed out to the officers of the Yakima First National Bank that its dealings in Sunshine Mining stock was in violation of the National Banking laws—

Mr. Cheney: Who do you mean by the 'officers'? [225]

A. The senior officers—President Hardy, Vice-president Rightmire and vice-president Joe Clift.

The Court: You say it showed they paid \$122,000—did your examination show how much they received?

A. It did—approximately \$199,000.

Q. (Winter): Go on.

A. Thru these letters and the sale of the stock it was apparent the bank had realized a profit in its dealings in Sunshine Mining stock of \$78,000, approximately.

Q. Did you ever see those letters—'18' and '19' before that examination? A. I did not.

Q. Showing you exhibit 16 and 17, I will ask you whether or not these letters were ever exhibited to you? A. They were not.

Q. They were not in the bank's records as you examined them? A. They were not.

Q. When is the first time you ever saw them?

A. I saw Exhibit '18' and '19' for the first time during the examination of June 24th, 1935.

(Testimony of Anthony J. Cooke.)

The Court: As I understand you never saw exhibits '16' and '17' until today? A. Yes.

The Court: But you saw '18' and '19' in June, 1935. A. That's correct.

Mr. Winter: Q. As a matter of fact you appeared before the Revenue Agent as a witness for Mr. Hardy didn't you, some time in 1937— [226]

Mr. Cheney: Object to that as wholly immaterial.

Mr. Winter: Its just preliminary—

The Court: All right—if its preliminary I will overrule the objection.

A. I appeared on June 16th or 17th, 1937, at the office of the Collector of Internal Revenue, agent in charge.

Q. Were those letters ever shown to you at that time, exhibits 16 and 17?

A. I didn't see those letters at that time.

Q. The other letters were there? '18' and '19'?

A. I don't recall having seen these letters at that meeting I attended.

Q. Did Mr. Hardy ever mention dealings in Sunshine Mining Company stock prior to his meeting with you in Spokane in April, 1935?

A. He did.

Q. I mean with respect to the bank dealing in Sunshine Mining stock? A. He did not.

Q. When you say he did, what you have reference to is the stock which was owned, shown on the books as held by the Yakima Holding Company?

A. In our discussions my understanding was the

(Testimony of Anthony J. Cooke.)

Sunshine Mining Company stock belonged to the Yakima Holding Corporation.

Q. Were you ever advised prior to April, 1935, by Mr. Hardy the bank had been dealing in mining stock? A. No.

Q. Did any other officer of the bank ever tell you [227] the bank had been dealing in Sunshine Mining Company stock? I mean prior to Mr. Hardy seeing you in Spokane in 1935—I will reframe the question. Did anyone connected with the bank, officer or otherwise, ever tell you prior to the time you talked with Mr. Hardy at Spokane in early April, 1935, that the bank had been dealing in Sunshine Mining Company stock.

A. They did not.

Q. Now, did you have any conversations with Mr. Rightmire in June, about the 24th, 1935?

A. I did.

Q. When was that?

A. It was during the examination.

Q. Was it before or after the letters, exhibits '18' and '19' had been shown?

A. That I can't say.

Q. Just relate the conversation — was anybody else present?

A. I don't recall anybody else being present.

Q. Can you relate substantially what was said by you to him and he to you in that conversation?

A. I indicated that the action of the bank in dealing in stock of the Sunshine Mining Company was ultra vires.

(Testimony of Anthony J. Cooke.)

Q. When you say 'I indicated'—that leaves us somewhat up in the air—how did you discuss it with him—and how did he discuss it with you?

A. I think Mr. Rightmire knew as well as I did—

Q. I don't want what you thought—did you discuss how the thing was handled, or what did you talk about? [228]

A. I told him the law prohibited banks dealing in stocks; that the act had been committed but that it would not be included in my report of the examination as a violation of the National Banking laws.

Q. When you say 'in your report' do you mean the report a copy of which was given to the bank.

A. In the report that was sent to the board of directors.

Q. Do you also prepare a confidential report to the comptroller? A. Yes.

Q. Did you say anything to Mr. Rightmire as to what you would do?

A. I merely told him the action in dealing in Sunshine Mining stock would not be shown in my report of the examination as a criticism.

Q. And did you show it in your report as a criticism?

A. Not in the report that went to the directors of the bank.

Q. What report did you show it in?

A. In the Departmental report to the Comptroller of the Currency. I outlined in detail the

(Testimony of Anthony J. Cooke.)

bank's transactions in the stock of the Sunshine Mining company and called the attention of the Comptroller to the apparent violation of the law.

Q. Had you made any such report to the Comptroller prior to your report of June 25th, 1935?

A. I had not.

Mr. Winter: That's all. [229]

The Court: What was the status of the bank at the time you went back there in June?

A. There was \$320,000 of assets doubtful—

The Court: In June, 1935—after this inquiry, what was the status of the assets?

A. Approximately about \$18,000 of losses listed—no doubtful assets and in the sale of \$950,000 of odd assets—

Q. What was the total?

A. I couldn't give you the figures.

Q. They had taken out how much, altogether, bad assets?

A. Between my first and last examinations the bank had charged off slightly less than half a million dollars.

Q. How did they wipe out the \$500,000 worth—where did they get the—

A. The bank had the benefit of a year's earnings between the first and last examination I made.

Q. Do you remember how much that amounted to?

A. In excess of a hundred thousand dollars.

Q. What else did they have to take care of the four hundred thousand dollars?

(Testimony of Anthony J. Cooke.)

A. I must refer to my examination of December 1934, and say there was \$320,000 listed on there—I can give you the approximate figures—

The Court: Thats all right. They made \$78,000 on this deal—that all went in.

A. \$78,000 there. There was \$94,000 payment made to the Yakima First National Bank by the First Securities [230] & Loan Company which was applied on the carrying value of the bonds of that company. The Yakima Holding Corporation purchased from the Yakima First National \$96,000 in loans—

Q. Do you remember anything else?

A. Some of their assets included in the \$320,000 were charged direct to undivided profits.

Q. Do you think there were any other items—or are you mistaken about that figure—thats \$316,000—

A. Between May 7th, 1934, and December, the bank charged off \$78,000.

Mr. Winter: I think the witness might be able to show more clearly if he were given the benefit of his examination—he is testifying merely from memory—he has his official report here—

The Court: I realize he is doing this from memory—

Mr. Winter: In view of the Court's questions I would like to ask one further question.

Q. If I understand you—what assets were eliminated between the examination of December, 1934, and the examination of June, 1935.

(Testimony of Anthony J. Cooke.)

A. \$320,000 were removed.

Q. One item you said was \$94,000 the bank received from the First Securities Loan Company applied on the carrying book value of the company's bonds on the bank's books.

A. That is correct.

Q. And another item, Yakima Holding Company, \$91,000. A. Yes. [231]

Q. And loans charged to—undivided profits, \$57,000. A. That's correct.

Q. And reduction of book value of bonds First Securities Loan charged to undivided profits, \$55,000. A. Those are the figures.

Q. By depreciation on fixed assets charged to undivided profits, \$20,000. Those are the figures in the elimination.

A. Yes. A total of \$320,000—I didn't put the hundreds in, just the thousands.

Cross Examination

By Mr. Cheney:

Q. Mr. Cooke, Counsel asked you in June of 1937 if you were called and requested to appear to testify before the Internal Revenue Office by Mr. Hardy. A. I was.

Q. And at that time did Mr. Hardy ask you to testify that you had told the National Bank Examiner all about this deal in 1934 and that you had discussed the matter and knew all about it in 1934?

A. Before I appeared at that hearing——

(Testimony of Anthony J. Cooke.)

Q. Just answer my question—when you first came in and talked to Mr. Hardy over there, didn't he expect you to testify to that—effect you knew all about it—

A. He did.

Q. Now then I understand you to testify that somebody in the Yakima Holding Company gave you a list of assets and had on there some 7500 shares of Sunshine Mining Company stock in 1934.

A. December, 1934. [232]

Q. What was that valuation?

A. Approximately \$60,000.

Q. You knew, did you not, that the value of Sunshine Mining Company stock in December, 1934, was between thirteen and fourteen dollars a share?

A. I did not.

Q. Didn't you want to find it out?

A. I had no quarrel with the Yakima Holding Corporation.

Q. Didn't you ask anybody when you saw that 7500 shares of Sunshine Mining stock?

A. I did not.

Q. Didn't you discuss that statement with Rightmire and Hardy?

A. I did not.

Q. Did you discuss it with Mr. Bradshaw?

A. I did not.

Q. Then you also testified that you got a statement from somebody in June, 1935, and it showed substantially the same number of shares of stock—

The Court: No, he testified that the amount that was owing by the Holding Company to the bank

(Testimony of Anthony J. Cooke.)

was substantially the same in '35 as it was in '34.

Q. Was there any Sunshine Mining Company stock listed in the statement of the Yakima Holding Company in 1935?

A. No Sunshine listed.

Q. Did you find any Sunshine stock in the vaults or the records of the Yakima First National Bank in 1935? [233]

A. I didn't see the stock. I was informed the bank owned 1500 shares of Sunshine Mining stock.

Q. Did you inquire where the stock was?

A. I did not.

Q. Now, let me see, I think you said the first time you heard anything about the Sunshine stock was in April, 1935, and the next time was in June, 1935 with reference to the bank, is that right?

A. That's correct.

Q. Now, then, you made a complete investigation of the bank's dealings in Sunshine stock when you came there in June, 1935?

A. I did.

Q. And from that investigation you found out they had started buying Sunshine stock in August, 1934.

A. I found out the bank had purchased 11,000 shares of Sunshine Mining stock from the Yakima Holding Corporation on or about May first, 1935.

Q. Did you read the letter?

A. Which letter are you referring to?

Q. December 12th—

A. I saw that letter (Exhibit 19) I saw that the first time during my examination in June, 1935.

(Testimony of Anthony J. Cooke.)

Q. You were a National Bank Examiner?

A. I was.

Q. And from that letter it appeared that some time in 1934 the Yakima First National Bank was buying or having bought some Sunshine stock.

A. That's what this letter indicates. [234]

Q. Did you check on that to find out whether it had been done as outlined in that letter?

A. I did not.

Q. You never asked any questions about it?

A. I did.

Q. Did you ask Mr. Hardy or Mr. Rightmire if they bought 7500 shares of stock in 1934?

A. I asked Mr. Hardy in June, 1935, how the bank acquired the stock of the Sunshine Mining company.

Q. What did he tell you?

A. The transactions were clearly explained to me.

Q. What did he tell you?

A. I made my own investigation first—

Q. Wait a moment—please answer the question—you said that Mr. Hardy made a complete explanation—tell us what Mr. Hardy said.

Q. During the course of the examination in discussing the Sunshine Mining stock—

The Court—Just answer the question.

(Question read.)

A. He said he had awakened from a sound sleep in the night and this plan in connection with

(Testimony of Anthony J. Cooke.)

the elimination of the objectionable assets was unfolded to him, or unfolded to him—involving Sunshine stock.

Q. You said he made a complete explanation. Now, go ahead and give us that complete explanation.

Mr. Winter: Ask him for the conversation.

Mr. Cheney: I am asking him what Mr. Hardy said in making that complete explanation. [235]

Q. What—

A. Mr. Hardy explained the entire transaction.

Q. What did he say—how he bought the stock—or where he bought the stock?

A. I don't recall he told me how the stock was bought.

Q. Did you read the letter—Exhibit '19'—will you read the first paragraph—read it out loud.

(Whereupon witness reads first paragraph of Exhibit '19'.)

Q. Did you ask him when the purchases were made? A. I did not ask him.

Q. Were you interested at all as to how the stock was purchased? Did you go to the Yakima Holding Company to find out—where it says the stock was to be purchased by the Holding Company some time prior to December 12th—

A. I did not.

Q. Did you make any inquiry of Mr. Bradshaw, or the Yakima Holding Company, or Mr. Hardy,

(Testimony of Anthony J. Cooke.)

whether or not the stock was bought as outlined in that letter?

A. I saw the letter—the letter was self explanatory.

Q. You accepted that as being true?

A. I did.

Q. You said that you ascertained they had purchased 12,500 shares of stock.

A. 11,000.

Q. They told you they had 1500 shares and had sold 11,000 shares—that's 12,500— [236]

A. There was eleven thousand sold and I was told during my examination in June, 1935, of the 1500 shares.

Q. Didn't you ask them how and when and from whom they purchased the 12,500 shares?

A. This letter gave me all the information I needed.

Q. You accepted that letter as being an exact statement of the facts.

A. Regarding the transactions between the bank and the Holding Company and Alex Miller.

Q. Now, let's go back to this conversation of April 5th, 1935. Mr. Hardy said he wanted to put on the books of the Yakima First National Bank among the assets 17,500 shares of Sunshine Mining stock—is that what he told you?

A. Yes.

Q. Where was he going to get the stock?

A. I don't know where he was to get it.

Q. Did you ask him any questions about it?

(Testimony of Anthony J. Cooke.)

A. I was told the stock was available.

Q. How much was the bank going to pay for the stock?

A. It was to be placed on the bank's books at \$12.50 a share, or \$218,000.

Q. Did you check up to find out what the value of Sunshine stock was in April?

A. I did not. I knew it was worth twelve dollars a share, at least twelve dollars a share in April, 1935.

Q. You didn't ask him where it was available.

A. I did not.

Q. Did he tell you whether or not the bank already owned [237] any of the stock?

A. I didn't ask him if the bank owned any of the stock.

Q. Was it 17,500? A. 17,500.

Q. It wasn't 12,500?

A. It was not 12,500.

Q. Did you ever have any conversation with Mr. Hardy at any time where the question of whether Mr. Hardy should sell the sunshine stock was involved?

A. I don't recall ever having said to Mr. Hardy he should sell the stock of the Sunshine Mining Company.

Q. Now, Mr. Cooke, did you have any connection between the 17,500 shares of Sunshine stock you testified he talked to you about on April 5th and the added \$180,000 you said he proposed raising some way in December?

(Testimony of Anthony J. Cooke.)

A. I didn't connect the Sunshine with these three hundred thousand dollars which was to be contributed by the Yakima Holding Corporation.

Q. You were insisting from April, 1934, that \$200,000 first, then \$300,000 be contributed as new money without any increase in the capital stock—

A. That's correct.

Q. And the chief method you insisted on was the R.F.C. A. That's right.

Q. And the Yakima First National Bank was definitely antagonistic toward the R.F.C.?

A. They didn't want it.

Q. You got so far you had them make application—I suppose you kept approaching them about it—what they [238] were going to do about it.

A. I did.

Q. When do you think the time was you got them to make this application to the R.F.C. for this \$200,000, June or July?

A. That application was submitted within a short time after the close of my examination.

Q. What do you call a short period?

A. A week.

Q. When it was granted they didn't do anything about taking it up—they said they didn't want it.

A. I was continually in touch with Mr. Hardy in connecting with this preferred stock.

Q. You kept insisting he take it and he insisted he didn't want it. A. That's right.

Q. Now, when you came down in your investiga-

(Testimony of Anthony J. Cooke.)

tion in December, 1934, did you have your attention called to the fact that Alex Miller was furnishing some five thousand shares of stock.

Q. I was told that Mr. Miller would contribute fifty thousand dollars—

Q. Did you have any conversation with them about Mr. Miller having something to do with furnishing some Sunshine mining stock?

A. I knew nothing of Sunshine stock.

Q. By the way, Mr. Cooke, did I understand you had no conversation about Sunshine stock at all during the time you were at the bank in '34?

[239]

A. I knew the stock was in the Yakima Holding Corporation.

Q. Did you have any conversation about the Sunshine stock with Mr. Hardy or Rightmire?

A. I had a conversation with them.

Q. About Sunshine stock? A. Yes.

Q. What did they say—

A. The stock was owned by the Yakima Holding Corporation.

Q. Who did you have the conversation with—

A. Mr. Hardy.

Q. What conversation did you have with Mr. Hardy about Sunshine stock in 1934?

A. A general discussion of it.

Q. About what?

A. At no time in the discussion was I informed the Yakima First National Bank owned any Sunshine stock.

(Testimony of Anthony J. Cooke.)

Q. Tell us what the conversation you had with Mr. Hardy or Rightmire?

A. The stock of the Sunshine Mining Company owned by the Yakima Holding Company was mentioned.

Q. What was said about the 7500 shares of stock on the books or in the possession of the Yakima Holding Corporation?

A. I knew and so did Mr. Hardy there was Sunshine stock in this picture.

Q. Do I understand that neither in '34 or '35 did you examine the books of the Holding Company?

A. I didn't make an examination.

Q. You just asked for somebody to give you a statement.

A. That was the only request I made—I made no [240] physical inspection of the records, of the assets.

Q. Now, several times in your examination you referred to the senior officers of the bank. Do I understand every time these senior officers were the same people?

A. Yes.

Q. When you refer to senior officers you refer to Hardy, Rightmire and Clift?

A. Yes.

Q. Did you have them together at one time?

A. In the discussions relating to working out the loans and credits I reviewed them with the officers that handled those particular loans.

The Court: What was the discussion about violation of the law—

A. I wasn't much concerned about the violation

(Testimony of Anthony J. Cooke.)

of the law because of what the bank had accomplished—

Q. So you didn't tell them to kick that asset out.

A. I didn't say anything as to how that should be shown on the books of the First National.

Q. It was a straight violation of the National Banking law?

A. The transactions in Sunshine Mining stock was—

Q. You knew that? A. Yes.

Q. Yet you were not much concerned with that violation of the law.

A. I called it to the attention of the Comptroller's office in my departmental report.

Q. But you didn't tell them to get rid of it?

[241]

A. I did not.

Mr. Winter: Q. How much longer after you made your report the bank was no longer a National bank?

A. It was in August, 1935, the business of the First National was sold to the National Bank of Commerce in Seattle.

Q. Did you get any instructions from the Comptroller was to do about it?

A. Before the First National was made a branch of the National Bank of Commerce, and the bank was handed to me for examination—

Q. Was the 1500 shares part of the assets sold to the Bank of Commerce? A. I don't know.

(Testimony of Anthony J. Cooke.)

Mr. Winter: I think its in evidence here it was sold by the liquidator, so it couldn't have been.

Q. I think you said in answer to Counsel's question that Mr. Hardy told you at the time you testified before the special agent in charge of the office you knew about the purchase of this stock in 1934, do you have an explanation of that?

The Court: He testified Mr. Hardy expected him to testify to that.

Q. Where did he say he expected you to testify to that?

A. We discussed Sunshine stock before I appeared at this hearing.

Q. That was in '37?

A. In my conversation before this hearing Mr. Hardy [242] tried to refresh my memory and say I said in a conversation he and I had which I was at Wenatchee I had urged him to sell the stock of the Sunshine Mining Company—I didn't recall ever saying to Mr. Hardy he should sell the stock.

Q. In answer to Counsel's question as to whether Sunshine stock was discussed I think you said you knew it was in the picture—what did you mean by that?

A. I knew from the statements furnished me at my request that the Yakima Holding Corporation in its report to me claimed ownership of the 7500 shares of Sunshine stock.

Q. Well, how would that be in the picture—you mean because the Yakima Holding Company owned

(Testimony of Anthony J. Cooke.)

all of the stock of the bank that was in the picture, is that what you mean?

A. It was in the Hold Company.

Q. You mean the assets behind the Holding Company were behind the bank? A. Yes sir.

The Court: What was the liability of the Holding Company at that time?

A. The Yakima Holding Company owned 4807½ shares of the five thousand shares outstanding of the Yakima First National Bank.

Q. Was there any double liability at that time?

A. There was.

Mr. Winter: Q. With respect to your statement that Sunshine stock was discussed from time to time was that about the time that Sunshine Mining stock was put on the market?

A. I don't know the date.

Q. On the New York Exchange, I mean. [243]

A. I don't know when it was listed on the New York Exchange.

Q. As a matter of fact it was common gossip in Yakima about Sunshine stock—most everybody in Yakima talked about it at that time. A. Yes.

Q. Were you ever urged to buy Sunshine stock?

A. Yes.

Recross Examination

By Mr. Cheney:

Q. When all is said and done the 7500 shares of stock on the books of the Yakima Holding Corporation was discussed between you and Mr. Hardy and Mr. Rightmire in your conversations.

(Testimony of Anthony J. Cooke.)

A. It was.

Mr. Cheney: That's all.

Witness excused.

Mr. Winter: We rest, your Honor.

REBUTTAL

R. M. HARDY,

recalled in rebuttal, testified as follows:

Direct Examination

By Mr. Cheney:

Q. In December of 1934 did you ever tell Mr. Cooke that the Yakima Holding Corporation owned 7500 shares of Sunshine Mining Company stock?

A. I did not.

Q. Did you make any detailed explanation or any explanation of the sunshine stock transaction to Mr. [244] Cooke in June of 1935?

A. No. I had told Mr. Cooke about it right along. There was no necessity for going into it in detail at that time. It was just the clean up he went into.

Q. Did you ever have any conversation with him in which you told him some thought struck you in the night?

Discussion

The Court: 'He told me he had awakened from a sound sleep in the night and this plan unfolded

(Testimony of R. M. Hardy.)

to him involving the sunshine stock'—that is substantially what my notes show the witness said.

Q. Did you ever have such a conversation with him?

A. I don't remember any such conversation. He told me yesterday afternoon I had such a conversation with him at his house——

Q. Do you ever recall making any such statement to him?

A. I don't remember saying that at night this plan unfolded to me. I may have, Mr. Cheney.

Q. In 1937 did you ask Mr. Cooke to come over and testify on behalf of the Guaranty Trust Company or Holding Company before the Income Tax Department? A. Yes sir, I did.

Q. At that time did you have any conversation with Mr. Cooke as to what he couldn't or wouldn't testify in reference to his knowledge of the transaction with the Sunshine stock?

A. I fully expected him to testify he knew all about [245] it. We sent a car down to meet Mr. Cooke at the plane. He was late and I met him at the Central where the Examiners of this district have their offices, and that was the first time I knew Mr. Cooke would deny he knew about the Sunshine stock transactions by the Yakima First National Bank in December, 1934.

Mr. Cheney: I think that's all.

Cross Examination

By Mr. Winter:

Q. Did you furnish Mr. Cooke with a balance

(Testimony of R. M. Hardy.)

sheet of the Yakima Holding Company, or one of the other employees?

A. I think Mr. Bradshaw furnished it to him.

Q. And included in that balance sheet was the 7500 shares.

A. I don't think I ever saw that statement.

Q. You don't know what it showed as to ownership of the 7500 shares? A. No.

Q. You know the book shows 7500 shares owned by the Yakima Holding Company?

A. I don't think it said that.

Q. Does it say anything on the books by which you could construe the Holding Company was trustee for the bank?

A. My personal knowledge was it was being held in trust.

Q. The only record prior to May 1st, 1935, on the Holding Company records or the only records anywhere [246] is the letter which is Exhibit '19' and which Mr. Bradshaw you say signed, took it over to the bank, and it was retained by Mr. Bradshaw in his own personal file, and that's the only item showing the exact ownership of the stock by the bank at that time?

A. I always considered——

Q. Was there any other document——

A. The ledger sheets which show the Yakima First National Bank——

Q. You show in all of your books from whom you purchased in the investment account.

(Testimony of R. M. Hardy.)

A. Well. I don't think—what do you mean by investment account?

Q. Well, you had investments in your own stock which you purchased from this corporation which owed you money—the First Securities—

A. Yes.

Q. You wouldn't say that entry indicated that that belonged—the stock you purchased belonged to the First Securities——

Mr. Cheney: I think the witness should be shown the entry.

Mr. Winter: I think he understands it. That's all.

Mr. Cheney: We rest. Pardon me, one more question.

Q. Mr. Hardy, did the Yakima First National Bank ever sell any stock to the Yakima Holding Company? A. No sir.

Mr. Cheney: That's all. We rest.

Whereupon case proceeded to argument. [247]

State of Washington

County of Spokane—ss.

I, J. J. Cole, do hereby certify that I am the Court Reporter who reported in shorthand the proceedings had and testimony taken in the above entitled cause; that the foregoing is an accurate transcription of such proceedings.

J. J. COLE

Court Reporter

[Endorsed]: Filed Jan. 7, 1943. [248]

No. 10356

United States
Circuit Court of Appeals
For the Ninth Circuit. 2

GUARANTY TRUST COMPANY, a corporation, as liquidating
trustee of Yakima Holding Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

And

UNITED STATES OF AMERICA,

Appellant,

vs.

GUARANTY TRUST COMPANY, a corporation, as liquidating
trustee of Yakima Holding Corporation,

Appellee.

Transcript of Record
In Two Volumes
VOLUME II
Pages 256 to 518

Upon Appeals from the District Court of the United States
for the Eastern District of Washington

Southern Division

MAR 30 1943

PAUL P. O'BRIEN,

CLERK

PLAINTIFF'S EXHIBIT No. 1

SUNSHINE MINING COMPANY

% Guaranty Trust Co.
Yakima, Wash.

Name—BRADSHAW GEO. H.

Address

Stockholder's Ledger

When Issued	—No. of Crtfs.—		From Whom Received	No. of Shares	Balance	When Cancelled	—No. of Crtfs.—		To Whom Transferred	No. of Shares
	Old	New					Old	New		
Aug 17 1934	2715A	226	Sarah Cole	100		Apr 16 1935	W226	W2038-47	Edw. M. Poeock	1000
	4836"	"	A A Larson	400			W259	W2048-55	" " "	800
	2425"	"	Geo K March	100			W334	W2056-62	" " "	700
	2427"	"	" " "	100						
	5397"	"	Dora Nickerson	100						
	4780"	"	Alfred Page	100						
	5020"	"	Trimble & Co.	100	1000					
Aug 20 1934	8203	259	John Scholler	50						
	2173A	"	Alen Lowing	50						
	4332"	"	A. A. Larson	100						
	5978"	"	" " "	100						
	419A	"	Robt Beck	100						
	23	"	E. K. Barnes	100						
	4	"	" " "	100						
	5	"	" " "	100						
	6	"	" " "	100	800					
Aug 22 1934	9799	334	Joe Schraneck	200	200					
	9798	"	" "	200	100					
	9786	"	James D. Scott	100	100					
	1878A	"	" " "	200	200					
	8542	"	Kathryn D. Wilson	100	700	2500				

PLAINTIFF'S EXHIBIT No. 2

SUNSHINE MINING COMPANY

Name—MILLER ALEX

Name—MILLER ALEX				Address		Stockholder's Ledger						
When Issued		—No. of Crtfs.— Old New		From Whom Received	No. of Shares Balance	When Cancelled		—No. of Crtfs.— Old New	To Whom Transferred	No. of Shares		
Jun	28 1934			Ford	123215	Jul	2 1934	5479	5578-9	Self	500✓	
Jul	2 1934	5499A	5578A	self	Oet 18 1939	300	Jul	6 1934	5477A	5608-27A	H. L. Bennett	2000✓
			9"	"	Oet 18 1939	200	Jul	17 1934	5478	5747A	W. P. Hopkins	500✓
Aug	4 1934	735	5891"	"	Oet 18 1939	3750	Jul	25 1934	789	5806A	Joe Miller	500✓
Nov	9 1934	5353A	W962			127465						
				R. M. Hardy	Oet 18 1939	1000	Jul	30 1934	5578A	5849-50-1A	Otto E Dulbach	300✓
						128465	Aug	4 1934	735	5889A	Mrs. Beryl J. Warren	750
						119915			"	5890"	M Blockhart	500
						114915			"	1	self	3750 5000
						118665	Aug	15 1934	5541A	67-8	Carl M. Stelle	5000
						108665			"	69	Yak 1st Nat Bk	5000 10000✓
						108465	Sep	12 1934	5579A	W674	Henry Carstens	200✓
						108465	Nov	15 1934	283	W991	Donald A. Meyer	100 19000
						109465						
										2		100
										3		100
										4		100
										5		100
										6		100
										7		100
										8		100
										9		100
										10		100
										1		100
										2		100
										W1000		100✓
										4		100
										5		100
										6		100
										7		100
										8		100
										9		100
										10		100
										1		100
										2		100
										W1013		100✓
										4		100
										5		100
										6		100
										7		100
										8		100

109465 Frwd

109465 Frwd

PLAINTIFF'S EXHIBIT No. 1

SUNSHINE MINING COMPANY

% Guaranty Trust Co.
Yakima, Wash.

Name—BRADSHAW GEO. H.

Address

Stockholder's Ledger

When Issued	—No. of Certs.—		From Whom Received	No. of Shares	Balance	When Cancelled	—No. of Certs.—		To Whom Transferred	No. of Shares
	Old	New					Old	New		
Aug 17 1934	2715A	226	Sarah Cole	100		Apr 16 1935	W226	W2038-47	Edw. M. Pocock	1000
	4836"	"	A A Larson	400			W259	W2048-55		
	2425"	"	Geo K March	100			W334	W2056-62		
	2427"	"	" " "	100						
	5397"	"	Dora Nickerson	100						
	4780"	"	Alfred Page	100						
	5020"	"	Trimble & Co.	100	1000					
Aug 20 1934	8203	259	John Scholler	50						
	2173A	"	Alen Lowing	50						
	4332"	"	A. A. Larson	100						
	5978"	"	" " "	100						
	419A	"	Robt Beck	100						
	23	"	E. K. Barnes	100						
	4	"	" " "	100						
Aug 22 1934	5	"	" " "	100						
	6	"	" " "	100	800					
	9799	334	Joe Schraneck	200	200					
	9798	"	" "	200	100					
	9786	"	James D. Scott	100	100					
	1878A	"	" " "	200	200					
	8542	"	Kathryn D. Wilson	100	2500					

SUNSHINE MINING COMPANY

Name—ALEX MILLER

When Issued	—No. of Crtfs.—		From Whom Received	No. of Shares	Balance	When Cancelled	—No. of Crtfs.—		To Whom Transferred	No. of Shares
	Old	New					Old	New		
			Forewarded	109465			283	W1019	Donald A. Meyer	100
								20		100
								1		100
								2		100
								W1023		100
								4		100✓
								5		100
								6		100
								7		100
								8		100
								9		100
								30		100
								1		100
								2		100
								W1033		100
								4		100✓
								5		100
								6		100
								7		100
								8		100
								9		100
								40		100
								1		100
								2		100
			104465					W1043		100
						Nov 22 1934	362	W1107	Donald A. Meyer	100✓
								8		100
								W1110		100
								1		100
								2		100
								3		100
								4		100
								5		100
								6		100✓
			103365					7		100

SUNSHINE MINING COMPANY

Name—ALEX MILLER

Name—ALEX MILLER			Address			Stockholder's Ledger				
When Issued	—No. of Crtfs.—		From Whom Received	No. of Shares	Balance	When Cancelled	—No. of Crtfs.—		To Whom Transferred	No. of Shares
	Old	New					Old	New		
				103365		Nov 22 1934	362	W1118	Donald A. Meyer	100
								9		100
								W1120		100
								1		100
								2		100
								3		100
								4		100
								5		100
								6		100
								7		100
								8		100
								9		100
								W1130		100
								1		100
								2		100
								3		100
								4		100
								5		100
								6		100
								7		100
								8		100
								9		100
								W1140		100
								1		100
								2		100
								3		100
								4		100
								5		100
								6		100
								7		100
								8		100
								9		100
								W1150		100
								1		100
								2		100
								3		100
				99765						

SUNSHINE MINING COMPANY
Address

No. 9

Name—MILLER, ALEX

Stockholder's Ledger

When Issued	—No. of Crtfs.—		From Whom Received	No. of Shares	Balance	When Cancelled		—No. of Crtfs.—		To Whom Transferred	No. of Shares
	Old	New				Nov	22 1934	Old	New		
					99765			362	W1154	Donald A. Meyer	100
					99465				5		100
									6		100
						Jan	2 1935	156	W1510	Carl M. Stelle	2000
					94465			"	W1511	Yakima First Nat'	3000
					84465	Jan	3 1934	141	W1514	L. R. Rightmire	10000
					72465			5540A	W1515	" " "	12000
						Jan	9 1935	341	W1556	Arthur Notman	1500
					67465			"	" 7	L. R. Rightmire	3500
						Apr	25 1935	424	W2159-2208	Edw. M. Pocock	5000
					62465						

Figures in italics indicate red typing in copy.

[253]

PLAINTIFF'S EXHIBIT No. 3

SUNSHINE MINING COMPANY

Name—POCOCK, EDWARD M

Address

5th Floor Exchange Bldg.

2nd & Marion

Seattle, Washington

Stockholder's Ledger

When Issued	—No. of Certs.—		From Whom Received	No. of Shares	Balance	When Cancelled	—No. of Certs.—		To Whom Transferred	No. of Shares
	Old	New					Old	New		
16 1935	W226	W2038	Geo. H. Bradshaw	100						
		9		100						
		40		100						
		1		100						
		2		100						
		3		100						
		4		100						
		5		100						
		6		100						
	✓	7		100						
	W259	W2048		100						
		9		100						
		50		100						
		1		100						
		2		100						
		3		100						
		4		100						
	✓	5		100						
	W334	W2056		100						
		7		100						
		8		100						
		9		100						
		60		100						
		1		100						
	✓	2		100						
23 1935	W 69	W2105	Yakima First Nat'l Bk	100	2500					
		6		100						
		7		100						
		8		100						
		9		100						
		10		100						
		1		100						
		2		100						
		3		100						
	✓	4		100						
			✓		3500	Forward				

Name--EDWARD M. POCKOCK

SUNSHINE MINING COMPANY

262

No. of Crfts.—				Address		Stockholder's Ledger				
When Issued	Old	New	From Whom Received	No. of Shares	Balance	When Cancelled	No. of Crfts.— Old	New	To Whom Transferred	No. of Shares
pr 23 1935	W 69	W2115	Forward	3500						
		6	Yakima First Nat'l Bk	100						
		7		100						
		8		100						
		9		100						
		20		100						
		1		100						
		2		100						
		3		100						
		4		100						
		5		100						
		6		100						
		7		100						
		8		100						
		9		100						
		30		100						
		1		100						
		2		100						
		3		100						
		4		100						
		5		100						
		6		100						
		7		100						
		8		100						
		9		100						
		40		100						
		1		100						
		2		100						
		3		100						
		4		100						
		5		100						
		6		100						
		7		100						
		8		100						
	✓	✓	✓	✓	100					
		9		100						
					7000	Forward				

SUNSHINE MINING COMPANY

Name—POCOCK, EDWARD M.

Address

Stockholder's Ledger

When Issued	—No. of Certs.—		From Whom Received	No. of Shares	Balance	When Cancelled	—No. of Certs.—		To Whom Transferred	No. of Shares
	Old	New					Old	New		
			Foreward	7000						
Apr 23 1935	W69	W2150	Yak. First Nat'l Bank	100						
	"	" 1	" " " "	100						
	"	" 2	" " " "	100						
	"	" 3	" " " "	100						
	"	" 4	" " " "	100	7500					
Apr 24 1935	W2093	W2155	Sanford & Co.	300	7800					
Apr 25 1935	424	W2159	Alex Miller	100						
		60		100						
		1		100						
		2		100						
		3		100						
		4		100						
		5		100						
		6		100						
		7		100						
		8		100						
		9		100						
		70		100						
		1		100						
		2		100						
		3		100						
		4		100						
		5		100						
		6		100						
		7		100						
		8		100						
		9		100						
		80		100						
		1		100						
		2		100						
		3		100						
		4		100						
		5		100						
		6		100						
	✓	✓ 7	✓	100	10700	Forward				

PLAINTIFF'S EXHIBIT No. 4

Name—YAKIMA FIRST NATIONAL BANK

SUNSHINE MINING COMPANY

No. 10

Address

Stockholder's Ledger

When Issued	—No. of Crtfs.—		From Whom Received	No. of Shares	Balance	When Cancelled	—No. of Crtfs.—		To Whom Transferred	No. of Shares
	Old	New					Old	New		
2/30/34	1666	5862A	Earnest Harmon	1000		11/23/34	W938	W1167	Carl M. Stelle	500
	437	"	" "	3000	4000		"	W1168	R. M. Hardy	500
5/34	5541A	W69	Alex Miller	5000			"	W1169	Self	4000 5000
7/34	736	W938	A. E. Larson Est	5000		12/11/34	W939	W1372	C. M. Stelle	4900
	2822	W939	" " " "	5000				1373	" "	100 5000
	W923	W940	" " " "	1000			W940	W1373	" "	1000
11/23/34	W938	W1169	Self	4000		12/11/34	W1169	W1374	Beatrice McCullough	500
1/2/35	156	W1511	Alex Miller	3000				1375	" "	500
3/1/35	5545A	W1847	Lila J Miller	7000				1376	" "	500
								1377	" "	500
								1378	Dudley P. Rogers	400
								1379	John M. Baker	600
								1380	" "	500
								1381	" "	500 4000
						1/9/35	W1511	W1549	L. R. Rightmire	2500
							W1511	W1550	" " "	500 3000
						4/11/35	5862A	W1970-2009	Donald A Meyer	4000
						4/23/35	W69	W2105-2154	Edw. M. Pocock	5000
						5/13/35	W1847	W2361	Marion Metals Ltd	7000

34000

34000

[258]

PLAINTIFF'S EXHIBIT No. 5

Certificate	Certificate
for	for
100 or more	100 or more
Shares	Shares
Number	Shares
WN. 69	—5000—

Incorporated Under the Laws of the State of
Washington

Sunshine Mining Company

Capital Stock—1,500,000 Shares

This Certifies That Yakima First National Bank is the owner of *Five Thousand fully paid and non assessable Shares with par value of ten cents (10c) per share of the Capital Stock of Sunshine Mining Company transferable only on the books of the Corporation by the holder hereof in person or by duly authorized attorney upon surrender of this Certificate properly endorsed. This Certificate is not valid until countersigned by the Transfer Agent and registered by the Registrar.

Thous — Hunds — Units

1	1	1
2	2	2
3	3	3
4	4	4
●	5	5
6	6	6
7	7	7
8	8	8
9	9	9
0	●	●

In Witness Whereof, the said Corporation has caused this Certificate to be signed by its duly authorized officers and to be sealed with the Seal of the Corporation this 15th day of August A. D. 1934.

Sunshine Mining Company	R. M. Hardy
Transfer Agent	President
By R. B. Kenyon	R. B. Kenyon
	Secretary

Sunshine Mining Co. Incorporated

Seal

May, 1918

Washington

North Pacific Bank Note Co.

This Certificate Is Transferable Either
In New York City or Yakima, Washington

Registered Aug. 15th, 1934

Guaranty Trust Company	Cancelled and
(Yakima, Wn.) Registrar	Reissued in
By Lon Boyle	Cft No W 2105 to
Authorized Officer	W 2154 inc.

[259]

(Endorsement)

For Value Received, hereby sell, assign and
transfer unto

.....
Shares of the Capital Stock represented by the with-
in Certificate, and do hereby irrevocably constitute
and appoint Attorney
to transfer the said Stock on the books of the within
named Corporation with full power of substitution
in the premises.

Dated Apr. 23 1935 19....

In presence of Yakima First National Bank
R. B. Kenyon by R. M. Hardy
 Pres.

Notice, The Signature of this Assignment Must
Correspond with the name as written upon the face
of the certificate in every particular without altera-
tion or enlargement, or any change whatever.

(U.S.I.R. Stamps)

Documentary

20c

(Stub)

Docy. Stamp on 5541A

Certificate No WN 69 For 5000 Shares
Issued to Yakima First National Bank

Dated Aug. 15, 1934 19....

From Whom Transferred

Alex Miller

Dated 19.....

No. Original Certificate 5541A

No. Original Shares 10000

No. of Shares Transferred 5000

Received Certificate No. For

Shares this day of 19.....

.....
F. V. Glaetzner

[260]

PLAINTIFF'S EXHIBIT No. 6

Incorporated Under the Laws of the State of
Washington

No. 424

xxx5000xxxShares

Sunshine Mining Company

Capital Stock—\$150,000.00

Fully Paid

Non-Assessable

This Certifies that Alex. Miller is the owner of Five thousand Shares of the Capital Stock of Sunshine Mining Co. transferable only on the books of the Corporation by the holder hereof in person or by Attorney, upon surrender of this Certificate properly endorsed.

In Witness Whereof, the said Corporation has caused this Certificate to be signed by its duly authorized officers and to be sealed with the Seal of the Corporation at Spokane, Washington, this 12th day of November, A. D. 1921.

(?) E. C. Tuesley Secretary

George Kebel, President

Shares 10c Each

Sunshine Mining Co. Incorporated

Seal

May, 1918

Spokane, Wash.

Cancelled and Reissued in
Cft No. W 2159 to W 2208 inc.

(Endorsement)

For Value Received, hereby sell, assign and
transfer unto

.....
Shares of the Capital Stock represented by the with-
in Certificate, and do hereby irrevocably constitute
and appoint

to transfer the said Stock on the books of the within
named Corporation with full power of substitution
in the premises.

Dated 19.....

In presence of

Alex Miller

..... Signature Guaranteed

YAKIMA FIRST NATIONAL
BANK

Yakima, Wash.

F. V. GLAETZNER

By

Asst. Cashier.

Notice, The Signature of this Assignment Must
Correspond with the name as written upon the face
of the certificate in every particular without altera-
tion or enlargement, or any change whatever.

(U.S.I.R. Stamps)

Documentary

20c

No. 51

(Stub)

Certificate No. 424 For —5000— Shares
Issued to Alex Miller Miller Bldg Yakima Wn.

Dated Nov 12 1921.

From whom transferred

Treasury

Dated 19.....

No. Original Certificate 102

No. Original Shares 1000000

No. of Shares Transferred 5000

Received Certificate No. for

Shares this day of 19.....

[262]

PLAINTIFF'S EXHIBIT No. 7

Certificate

for

100 or more

Shares

Certificate

for

100 or more

Shares

Number

WN 226

Shares

—1000—

Incorporated Under the Laws of the State of

Washington

(U.S.I.R. Stamp)

(Documentary)

(4c)

Sunshine Mining Company

Capital Stock—1,500,000 Shares

This Certifies that Geo. H. Bradshaw is the owner of *One Thousand fully paid and non-assessable Shares with par value of ten cents (10c) per share of the Capital Stock of Sunshine Mining Company, transferable only on the books of the Corporation

by the holder hereof in person or by duly authorized attorney upon surrender of this Certificate properly endorsed. This Certificate is not valid until countersigned by the Transfer Agent and registered by the Registrar.

Thous — Hunds — Units

●	1	1
2	2	2
3	3	3
4	4	4
5	5	5
6	6	6
7	7	7
8	8	8
9	9	9
0	●	●

In Witness Whereof, the said Corporation has caused this Certificate to be signed by its duly authorized officers and to be sealed with the Seal of the Corporation this 17th day of August A. D. 1934.

Sunshine Mining Company

R. M. Hardy

Transfer Agent

President

By R. B. Kenyon

R. B. Kenyon

Secretary

Sunshine Mining Co. Incorporated

Seal

May, 1918

Washington

North Pacific Bank Note Co.

This Certificate Is Transferable Either
In New York City or Yakima, Washington

Registered Aug. 17th, 1934.

Guaranty Trust Company	Cancelled and
(Yakima, Wn.) Registrar	Reissued in
By Lon Boyle	Cft. No. W 2038 to
Authorized Officer	2047 inc.

[263]

(Endorsement)

For Value Received, hereby sell, assign and
transfer unto

.....
Shares of the Capital Stock represented by the with-
in Certificate, and do hereby irrevocably constitute
and appoint Attorney
to transfer the said Stock on the books of the within
named Corporation with full power of substitution
in the premises.

Dated 19.....

Geo. H. Bradshaw

In presence of

Signature Guaranteed

YAKIMA FIRST NATIONAL
BANK

Yakima, Wash.

F. V. GLAETZNER

By Asst. Cashier.

Notice, The Signature of this Assignment Must
Correspond with the name as written upon the face
of the certificate in every particular without altera-
tion or enlargement, or any change whatever.

(Stub)

Certificate No. WN 226 For 1000 Shares

Issued to Geo. H. Bradshaw

Dated Aug. 17, 1934 19....

From Whom Transferred

Sarah Cole, A. A. Larson, Geo. K. March, Dora
Nickerson, Alfred Page, Trimble & Co.

Dated 19.....

No. Original Certificate	No. Original Shares	No. of Shares Transferred
2715A 5397A	100—100	1000
4836“ 4780“	400—100	
2425“ 5020“	100—100	
2427“	100	

Received Certificate No. 226 for 1000 Shares this
..... day of 19.....

Geo. H. Bradshaw [264]

Memo Sale

E. J. Gibson & Co.

Five Wall Street

Main 3381

Spokane, Wash.,

Aug. 16, 1934.

Sold to Guaranty Trust Co. 1000 Shares Sunshine
Stock @ 10c par value. Tax 4c.Certificate Nos. 4780A, 5397A, 2715A, 2425A,
2427A, 5020A, 4836A.

E. J. Gibson & Co.

by B.

We hereby certify that delivery of the above de-

scribed stock is made solely for completing the purchase for your account, and that we have no ownership or interest in this stock whatsoever.

(U.S.I.R. Stamps)

(Documentary)

(4c)

(Stock Transfer)

[265]

PLAINTIFF'S EXHIBIT No. 8

Certificate

for

100 or more

Shares

Certificate

for

100 or more

Shares

Number

WN 259

Shares

—800—

Incorporated Under the Laws of the State of
Washington

(U.S.I.R. Stamp)

(Documentary)

(4c)

Sunshine Mining Company

Capital Stock 1,500,000 Shares

This Certifies that Geo. H. Bradshaw is the owner of *Eight Hundred fully paid and non-assessable Shares with par value of ten cents (10c) per share of the Capital Stock of Sunshine Mining Company transferable only on the books of the Corporation by the holder hereof in person or by duly authorized attorney upon surrender of this Certificate prop-

erly endorsed. This Certificate is not valid until countersigned by the Transfer Agent and registered by the Registrar.

Thous — Hunds — Units

1	1	1
2	2	2
3	3	3
4	4	4
5	5	5
6	6	6
7	●	7
8	8	8
9	9	9
●	0	●

In Witness Whereof, the said Corporation has caused this Certificate to be signed by its duly authorized officers and to be sealed with the Seal of the Corporation this 20th day of August A. D. 1934.

Sunshine Mining Company	R. M. Hardy
Transfer Agent	President
By R. B. Kenyon	R. B. Kenyon
	Secretary

Sunshine Mining Co. Incorporated
Seal

North Pacific Bank Note Co.
This Certificate Is Transferable Either
In New York City or Yakima, Washington
May, 1918
Washington

Registered Aug. 20th, 1934.

Guaranty Trust Company	Cancelled and
(Yakima, Wn.) Registrar	Reissued in
By Lon Boyle	Cft No. W 2048 to
Authorized Officer	2055 inc.

[266]

(Endorsement)

For Value Received, hereby sell assign and transfer unto.....
 Shares of the Capital Stock represented by the within Certificate, and do hereby irrevocably constitute and appoint
 Attorney to transfer the said Stock on the books of the within named Corporation with full power of substitution in the premises.

Dated..... 19.....

GEO. H. BRADSHAW

In presence of

Signature Guaranteed

YAKIMA FIRST NATIONAL
 BANK

Yakima, Wash.

F. V. GLAETZNER

By Asst. Cashier.

Notice, The Signature of this Assignment must correspond with the name as written upon the face of the Certificate in every Particular without alteration or enlargement, or any change whatever.

(Stub)

Certificate No. WN 259 for 800 Shares

Issued to Geo. H. Bradshaw

Dated Aug. 20, 1934

From Whom Transferred

John Scholler, Alen Lowing, A. A. Larson,

R. Beck, E. K. Barnes

Dated 19.....

No. Original Certificate		No. Original Shares		No. of Shares Transferred
23	8203	100	50	800
24	2173A	100	50	
25	4332“	100	100	
26	5978“	100	100	
	419“		100	

Received Certificate No. for

Shares this day of 19.....

GEO. H. BRADSHAW [267]

Memo Sale

E. J. Gibson & Co.

Five Wall Street

Main 3381

Spokane, Wash.,

Aug. 17, 1934.

Sold to Guaranty Trust Co. 800 Shares.....

Stock @ 10c par Value. Tax 4c.

Certificate Nos. 5978A, 4332A, 419A, 8203, 2173A,
23-4-5-6.

E. J. Gibson & Co.

By B.

We hereby certify that delivery of the above de-
scribed stock is made solely for completing the pur-

chase for your account, and that we have no ownership or interest in this stock whatsoever.

(U.S.I.R. Stamp)

(Documentary)

(4c)

(Stock Transfer) [268]

PLAINTIFF'S EXHIBIT No. 9

Certificate

for

100 or more

Shares

Number

WN 334

Certificate

for

100 or more

Shares

Shares

700

Incorporated Under the Laws of the State of

Washington

(U.S.I.R. Stamp)

(Documentary)

(4c)

Sunshine Mining Company

Capital Stock—1,500,000 Shares

This Certifies that Geo. H. Bradshaw is the owner of *Seven Hundred fully paid and non-assessable Shares with par value of ten cents (10c) per share of the Capital Stock of Sunshine Mining Company transferable only on the books of the Corporation by the holder hereof in person or by duly authorized attorney upon surrender of this Certificate properly endorsed. This Certificate is not valid until countersigned by the Transfer Agent and registered by the Registrar.

Thous — Hunds — Units

1	1	1
2	2	2
3	3	3
4	4	4
5	5	5
6	6	6
7	●	7
8	8	8
9	9	9
●	0	●

In Witness Whereof, the said Corporation has caused this Certificate to be signed by its duly authorized officers and to be sealed with the Seal of the Corporation this 22nd day of August A. D. 1934.

Sunshine Mining Company	R. M. Hardy
Transfer Agent	President
By R. B. Kenyon	R. B. Kenyon
	Secretary

Sunshine Mining Co. Incorporated
Seal

This Certificate Is Transferable Either
In New York City or Yakima, Washington

May, 1918

Washington

North Pacific Bank Note Co.

Registered Aug. 22nd, 1934

Guaranty Trust Company	Cancelled and
(Yakima, Wn.) Registrar	Reissued in
By Lon Boyle	Cft No. W 2056
Authorized Officer	to 2062 inc. [269]

(Endorsement)

For Value Received, hereby sell, assign and
transfer unto

.....
Shares of the Capital Stock represented by the with-
in Certificate, and do hereby irrevocably constitute
and appoint Attorney
to transfer the said Stock on the books of the within
named Corporation with full power of substitution
in the premises.

Dated....., 19.....

GEO. H. BRADSHAW

In presence of

.....
Notice, The Signature of this Assignment Must
Correspond with the name as written upon the face
of the certificate in every particular without altera-
tion or enlargement, or any change whatever.

Signature Guaranteed

YAKIMA FIRST NATIONAL
BANK

Yakima, Wash.

By F. V. GLAETZNER

Asst. Cashier.

(Stub)

Certificate No. WN 334 for 700 Shares

Issued to Geo. H. Bradshaw

Dated Aug. 22, 1934 19....

From Whom Transferred

Joe Schranek, James D. Scott,

Kathryn D. Wilson

Dated..... 19.....

No. Original Certificate	No. Original Shares	No. of Shares Transferred
9799	200	700
9798	100	
9786	100	
1878A	200	
8542	100	

Received Certificate No..... for.....
Shares this.....day of..... 19.....

GEO. H. BRADSHAW [270]

PLAINTIFF'S EXHIBIT No. 10

19			Check No.	Cash Disbursements	CR Y.F.N. Bank	CR General	DR General	DR Expense	DR Employees Insurance	DR Notes Payable	19 DR Sunshine Mining Co. Stock
1934											
Apr	9	H. L. Leeper, P. M. Revenue Stamps	333	5.00	5.00			5.00			
	30	U. S. Gov't Tax on Check		.04	5.00✓ .04			5.00✓ .04			
May	3	Yak. First Natl Bank Int on Note	334	75.00	75.00			75.00			
	4	Guaranty Trust Co. Payt on R. E. Cont.	5	5000.00			5000.00R.E.			5000.00	
		Met. Life Ins. Co. Prem for May 1934	6	115.71	5115.71				115.71		
	31	Yak. County Treas. 1st 1/2 1933 Taxes L 12 B 30 (Old G. T. Co. Bldg)	7	551.06	5115.71✓ 551.14		5000.00✓	551.06		5000.00	
		U. S. Govt Tax on Checks	-	.08	551.14✓ 551.14			.08			
June	4	Met. Life Ins. Co. Prem for June 1934	8	115.71	115.71			551.14✓		115.71	
	27	Yak. First Natl Bank Int. on Note	9	750.00	750.00			750.00		115.71✓	
July	2	U. S. Gov't Tax on Cks	-	.06	750.00✓ 115.71			.06			
		Met. Life Ins. Co. Prem for July 1934	340	115.71	115.77				115.71		
	3	Guaranty Trust Co. Int on Cont to 6/30/34	1	1078.33	1078.33			1078.33		115.71✓	
	6	Yak First Natl Bk. Int on Note	2	60.00	1078.33✓ 60.00			60.00			
	25	Yak. Bindery & Printing Co Stock Ledger Sheets	3	3.60	60.00✓ 3.60			3.60			
	30	Met. Life Ins. Co. Prem for Aug 1934	4	115.71	115.71			3.60✓		115.71	
Aug	2	Yak First Natl Bk Int of Note	5	75.00	115.71✓ 75.00			75.00		115.71✓	
	9	Yak Daily Republic Publishing Fin Statement	6	4.95	4.95			4.95			
	10	U. S. Govt Tax on Checks	-	.06	4.95✓ .06			.06			
	17	Y F N B 1000 Sh. Sunshine Mining Co Stock	7	7725.00	.06✓			.06✓			
		" 5000 " " " " " "	8	40000.00							47725.00
	18	" 800 " " " " " "	9	6320.00	47725.00✓ 6320.00						47725.00✓ 6320.00
	21	" 700 " " " " " "	350	5530.00	6320.00✓ 5530.00						6320.00✓ 5530.00
					5530.00✓						5530.00✓

PLAINTIFF'S EXHIBIT No. 11

39

39

		Cash Receipts	DR Y.F.N Bank	DR General	CR General	CR Income	CR Employees Insurance	CR Notes Payable	CR Sunshine Mining Co Stock	CR Subscribed Capital	CR Shares of Stock
1935											
Mar	30	G.T.C. Ins. Prem for Mar	22.23								
		YFNB " " " "	88.92								
		FNB-W " " " "	7.41	118.56				118.56			
		Cash—Revenue Stamps	22.40	22.40	Exp 22.40						
			140.96✓		22.40✓			118.56✓			
Apr	4	Sunshine Mining Co. Divd 7500 sh @ 20¢	1500.00	1500.00		1500.00					
			1500.00✓			1500.00✓					
	20	G.T.Co Ins Prem for Apr (Bal due 54¢)	31.95								
		YFNB " " " Apr	80.37								
		FNB-W " " " "	5.70	118.02				118.02			
			118.02✓					118.02✓			
May	1	Yak. First Natl Bank Sale of 7500 sh Stock Sunshine Mining Co	61451.50		Sunshine Mining Co Stock				61451.50		
	1	Sunshine Mining Co. Stock 5000 sh @ \$12.00		60000.00	Y.H.Corp Stock						
		Yakima Holding Corp. Stock			Invest Acct.						
		Invest Acct 1119 shares @ \$15.00			16785.00						
		Capital Account 2881 shares @ \$15.00								43215.00	28.81
		The total of 4000 shares are covered by Cert #686 Dated 5-1-35 issued to Alex Miller									
		†For explanation see below									
	1	Yak. First Natl Bank Sale of 5000 sh stock Sunshine Mining Co. at \$12.00 per sh	60000.00						60000.00		
	1	J. D. Keck Revenue Stamps Re Transfer Stock	13.20	121464.70	Exp 13.20						
			121464.70✓	60000.00✓	16785.00✓				121451.50✓	43215.00✓	28.81✓
					13.20✓						
		†Under letter dated 12-11-34 Alexander Miller agreed to exchange 5000 shares Stock Sunshine Mining Co @ \$12.00 per share for 4000 shares stock Yakima Holding Corporation @ \$15.00 per share									

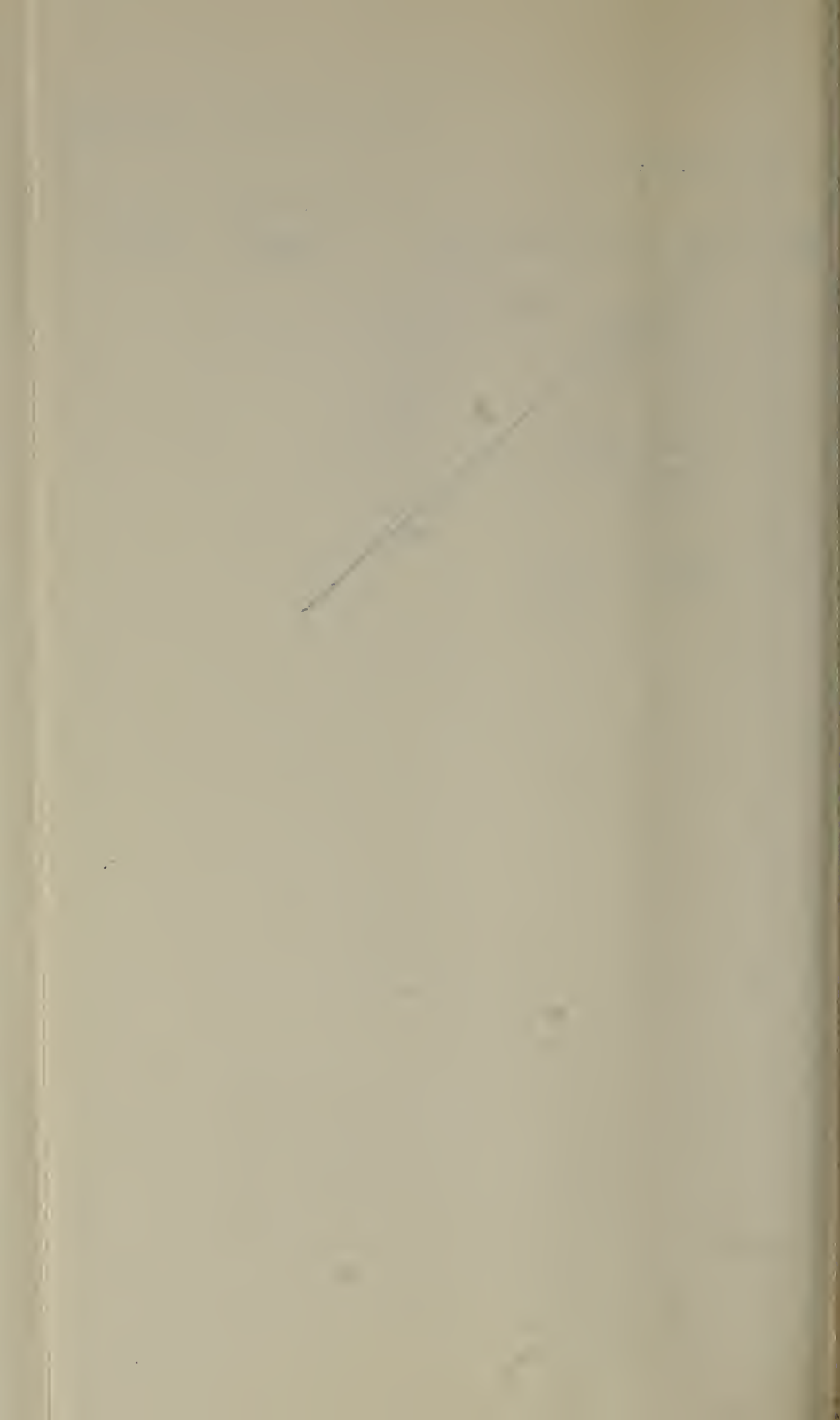
Plaintiff's Exhibit No. 11—(Continued)

39 (Continued)

Cash Receipts Y.F.N. Bank

May 6	Yak. F. Natl Bank	Notes	26737.35	26737.35
		Purchased		
	Ernest F & Josephine			
	M. Berg	9000.00		
	L. A. Dash	2840.00		
	Harry Coonse	525.88		
	" "	2000.00		
	Dexter Cahoon	1850.00		
	Wapato Fruit & Cold			
	Stg. Co.	10000.00		
	" " " "	521.47		
	Error—			
	SEE C.D.J. Page 22			

[273]



PLAINTIFF'S EXHIBIT No. 12

Sheet No.....			Account No.....				
Rating Business		Credit Limit	Name—SUNSHINE MINING CO. STOCK				
			Address				
Date	Items		Folio	✓	Debits	Credits	Balance
1934							
Aug 17	Y F N B				1000 Sh		
					5000 “		47725.00
18	“ “ “ “				800 “		54045.00
21	“ “ “ “				700 “		59575.00
					—		
					Total 7500 “		
31	Cash—Transfer Fees					1.50	59576.50
1935							
Jan 6	To Write up Value 25¢ per Sh. as of 12/31/34						
May 1	Y F N B—Alex Miller				CRJ 38	1875.00	61451.50
1	“ “ “ “ 7500 Sh Sold				CRJ 39	60000.00	121451.50
	“ “ “ “ 5000 “				CRJ 39 }		
						61451.50	
						60000.00	

[274]

PLAINTIFF'S EXHIBIT No. 13

No. 347 -----

Aug. 17th 1934

\$7725.00

In Favor of ----- Yak. F. N. BK. -----

Charge Account of -----

Particulars—1000 Sh. S. M. Co. Stock

-----CDJ 19 -----

Cash Book Folio -----

No. 348 -----

Aug. 17 1934 ----- \$40,000 -----

In Favor of ----- Y. F. N. BK. -----

Charge Account of -----

Particulars—5000 Sh. S. M. Co. Stock

-----CDJ 19 -----

Cash Book Folio -----

[275]

PLAINTIFF'S EXHIBIT No. 14

No. 349 -----

Aug. 18th 1934 ----- \$6320.00 -----

In Favor of ----- Y. F. N. BK. -----

Charge Account of -----

Particulars—800 Sh. Sun. M. Co. Stock

-----CDJ 19 -----

Cash Book Folio -----

No. 350 -----

Aug. 21 1934 ----- \$5530.00 -----

In Favor of Y. F. N. BK.
Charge Account of
Particulars 700 Sh. S. M. Co.

CDJ 19
Cash Book Folio-----
[276]

PLAINTIFF'S EXHIBIT No. 15.
ARTICLES OF INCORPORATION
OF
YAKIMA HOLDING CORPORATION.

KNOW ALL MEN BY THESE PRESENTS,
That we, the undersigned citizens of the United
States, all residing at Yakima, Washington, have as-
sociated ourselves and do hereby associate ourselves
together for the purpose of forming a corporation
under the general incorporation laws of the State
of Washington, and hereby make and adopt these
Articles of Incorporation in triplicate.

* * * * * *

ARTICLE II.

Objects and Purposes.

The objects and purposes of the formation of this
corporation are to establish a holding company to
take and hold the capital stock of banks, trust com-
panies, corporations, joint stock companies and asso-
ciations, and generally to hold corporate stocks,
bonds and obligations and participate in the man-
agement and control of the corporations whose stock

Plaintiff's Exhibit No. 15—(Continued)

or bonds it may hold. To that end it shall have the power, and the objects for which it is formed shall be:

1. To subscribe for or cause to be subscribed for, buy, own, hold, purchase, receive or acquire, and to sell, negotiate, guarantee, assign, deal in, exchange, transfer, mortgage, pledge or otherwise dispose of shares of capital stock, script, bonds, coupons, mortgages, debentures, debenture stock, securities, notes acceptances, drafts and evidence of indebtedness issued by banks, trust companies or other corporations, joint stock companies or associations, whether public or private and while the owner thereof, to possess and to exercise in respect thereof all the rights, powers and privileges of ownership, including the right to vote thereon; to guarantee the payment of dividends on any shares of capital stock of any of said banks, corporations, [277] joint stock companies or associations in which this corporation has or may at any time have an interest and become surety in respect of endorsers or otherwise guarantee the payment of principal or interest of any script, bonds, coupons, mortgages, debentures, debenture stock, securities, notes, drafts, bills of exchange or evidence of indebtedness issued or created by any such corporations, joint stock companies or associations; to become surety for or guarantee the carrying out or performance of any and all contracts, leases and obligations of every kind of any bank, corporation, joint stock company or association, and in particular of any corporation, banking

Plaintiff's Exhibit No. 15—(Continued)

association or trust company, any of whose shares, script, bonds, coupons, mortgages, debentures, debenture stock, securities, notes, drafts, bills of exchange or evidences of indebtedness are at any time held by or for this corporation, and to do any acts or things designed to protect, preserve, improve or enhance the value of any such shares, script, bonds, coupons, mortgages, debentures, debenture stock, securities, notes, drafts, bills of exchange or evidence of indebtedness, and to issue in exchange for and in payment of any stock, bonds, debentures, debenture stock, securities, notes, drafts or other property purchased by it, its own stock, bonds or other obligations or securities.

2. To organize, incorporate, re-organize, finance and to aid and assist financially or otherwise, companies, corporations, joint stock companies, syndicates, partnerships and associations of all kinds, particularly those engaged in banking, or in other financial enterprises, and to underwrite, subscribe for and endorse the bonds, stocks, securities, debentures, notes or undertakings of any such companies, corporations, joint stock companies, syndicates or associations, or to make any guarantees in connection therewith or otherwise for the payment of money or for the performance of any obligation or undertaking, and to do any and all things necessary or convenient to carry any of such purposes into effect. [278]

3. To issue shares of capital stock, bonds, debentures, notes or other obligations of this corpora-

Plaintiff's Exhibit No. 15—(Continued)

tion for cash, for labor done, for property, real or personal, or lease thereof, or for any compensation for any of the foregoing, or for any property, real or personal, which it may be deemed advantageous to acquire.

4. To obtain, grant, purchase, lease or otherwise acquire any concessions, rights, options, patents, privileges, lands, rights of way, sites, properties, undertakings or business, or any rights, options or contracts in relation thereto, and to perform, carry out and fulfill the terms and conditions thereof and to carry the same into effect, and to develop, maintain, lease, sell, transfer and dispose of and otherwise deal with the same.

5. To acquire by purchase, lease or otherwise, and to own, hold, sell, mortgage, release, encumber and improve real estate wheresoever situate and to construct and erect thereon structures of any kind and lease space therein and collect rentals therefor and to own stock in any building corporation and assist in financing the erection of office or other buildings.

6. To acquire by purchase or otherwise, hold, possess, mortgage, transfer, sell, convey or otherwise dispose of and deal in all kinds of personal property wheresoever situate.

7. To acquire, hold, own, utilize and dispose of grants, concessions and franchises or interest therein; to cause to be formed, merged or re-organized, and to promote and aid in any way permitted by law the formation, merger or re-organization of any

Plaintiff's Exhibit No. 15—(Continued)

corporation, domestic or foreign; to enter into contracts of underwriting of securities of any other corporation, domestic or foreign, and to buy, sell and deal in the same or any interest therein, and to act as manager of such underwriting agreements.

8. To investigate and report with respect to, and undertake, carry on, assist or participate in the liquidation or re-organization or consolidation of financial, commercial, mercantile, manufacturing or other business concerns, firms, associations and [279] corporations, domestic or foreign, and for all purposes and to the extent permitted by law.

9. To undertake and carry on any business, undertaking, enterprise, venture, transaction or operation generally undertaken or carried on by promoters, contractors and merchants, and in the course thereof, to acquire and dispose of or otherwise to turn to account or realize upon all or any negotiable or transferrable instruments or securities.

10. To borrow money for any purpose and to issue notes, bonds, debentures, debenture stock, trade acceptances and/or other obligations therefor, and to secure the same by pledge or mortgage of all or any part of the property of this corporation, either real or personal, or to issue bonds, debentures, debenture stock, notes or other obligations without any such security.

11. To draw, make, accept, endorse, discount, guarantee, execute and issue promissory notes, bills of exchange, drafts, warrants and all kinds of obliga-

Plaintiff's Exhibit No. 15—(Continued)

tions and certificates and negotiable or transferrable instruments.

12. To loan money and to take as evidence of any security for money loaned, notes, mortgages, deeds of trust, bonds, debentures or other choses in action.

13. To act as agent, factor or broker, to write insurance either on its own property or for others and to handle and control, rent and manage its own property or property belonging to others.

14. To have one or more offices to carry on any or all of its operations in business, and without restriction or limit, to own property and do business in any of the states or territories of the United States, and in the District of Columbia and in any and all foreign countries, subject to the laws of such state, district, territory or country.

15. To do any and all acts and things necessary or convenient to the attainment of the purposes for which this corporation is organized, or any of them, and to the same extent as natural persons lawfully could do in any part of the world in so far as such [280] acts are permitted to be done by a corporation organized under the laws of the State of Washington.

The foregoing clauses shall be construed both as objects and powers, and it is hereby expressly provided that the foregoing enumeration of specific powers shall not be held to limit or restrict in any manner the powers of this corporation, and are in furtherance of and in addition to, and not in limitation of the general powers conferred by the laws of the State of Washington.

Plaintiff's Exhibit No. 15—(Continued)

* * * * *

BY-LAWS
of the
YAKIMA HOLDING CORPORATION

Adopted by the Trustees of said corporation at their meeting duly convened and held on the 23rd day of January, 1930.

* * * * *

Article II.—Board of Trustees

* * * * *

Section 12. Ratification by Stockholders of Acts or Contracts. The Board of Trustees, in its discretion, may submit any contract or act for approval or ratification at any annual meeting of the Stockholders, or at any meeting of the Stockholders called for the purpose of considering any act or contract; and any contract or act that shall be approved or ratified by the vote of the holders of a majority of the common stock of the corporation, which is represented in person or by proxy at such meeting, (provided that a lawful quorum of the stockholders be there represented in person or by proxy) shall be as valid and binding upon the corporation and upon all the stockholders as though it had been approved and ratified by every stockholder of the corporation.

* * * * *

Section 15. General Powers. The Board of Trustees may adopt or amend by-laws for the corporation; make rules not inconsistent with the laws

Plaintiff's Exhibit No. 15—(Continued)

of the State of Washington, or with the by-laws of this corporation, for the guidance of its officers and management of its business.

They may, by vote of a majority of the Trustees, remove any officer of the corporation; any officer shall, on demand deliver to the Board any books, papers, records, documents or other instruments pertaining to the business of the corporation in his possession; and the Board shall fill all vacancies that may occur in the offices of the corporation.

The Board of Trustees may authorize the sale, conveyance, mortgage, lease or other disposition of any of the property of the corporation in the ordinary course of business, and when authorized thereto, by vote of two-thirds of the stockholders of the corporation who are entitled to vote, may sell all of [282] the property of the corporation in one transaction. All deeds, mortgages and other instruments necessary to be executed under the seal of the corporation, shall be executed by the President or Vice President and attested by the Secretary when so ordered by the Board of Trustees. All other instruments may be executed in the name of the corporation by the President or such other officer as the Board of Trustees may authorize.

Article III.—Executive Committee.

Section 1. Executive Committee; Of Whom Composed. The Chairman of the Board of Trustees, the President, the Vice President, the Treasurer and the Secretary of the corporation, duly elected and

Plaintiff's Exhibit No. 15—(Continued)

acting, shall constitute the executive committee of the corporation, and the President of the corporation shall be the Chairman and the Secretary the Secretary of the Executive Committee.

Section 2. Action of the Committee to Be Reported to the Board. All actions taken and things done by the Executive Committee shall be reported to the Board of Trustees at its meeting next succeeding such action, and shall be subject to revision or alteration by the Board of Trustees; provided, that no rights or acts of third parties shall be affected by any such revision or alteration.

Section 3. Rules of Procedure. The Executive Committee shall fix its own rules of procedure and shall meet where and as provided by such rules, or by resolution of the Board of Trustees, but in every case the presence of a majority of the members shall be necessary to constitute a quorum. In every case the affirmative vote of a majority of the members of the committee present at the meeting shall be necessary to its adoption of any motion or resolution.

Section 4. Powers and Duties. During the intervals between the meetings of the Board of Trustees, the Executive Committee shall possess and may exercise all the powers of the Board of Trustees in the management of all of the affairs of the [283] corporation and the execution of legal instruments, with or without corporate seal, in such manner as said committee shall deem to be for the best interest of the corporation, in all cases in which specific di-

Plaintiff's Exhibit No. 15—(Continued)

rections shall not have been given by the Board of Trustees. [284]

* * * * *

The annual meeting of the stockholders was held in the Yakima First National Bank Building, Yakima, on Tuesday, February 5th, 1935 at 3:00 P. M. pursuant to notice.

The meeting was called to order by Mr. R. M. Hardy, President, who acted as Chairman. Mr. Geo. H. Bradshaw acted as Secretary.

At the request of the Chairman the Secretary then read the notice addressed to the stockholders calling the meeting, which said notice is as follows:

“Yakima, Washington, January 18, 1935

“The regular annual meeting of the stockholders of the Yakima Holding Corporation will be held in the Yakima First National Bank Building, at the corner of Yakima Avenue and South First Street, Yakima, Washington, on Tuesday, February 5th, 1935 at 3:00 P. M.

“Yours very truly,

GEO. H. BRADSHAW

Secretary”.

An affidavit made by Wm. B. Bradshaw was also read, setting forth that a copy of such notice was mailed to all the stockholders of record on the 19th day of January, 1935.

At the request of the Chairman, the Secretary made the roll call and it was found that the follow-

Plaintiff's Exhibit No. 15—(Continued)

ing persons, being stockholders of the Company,
were present in person:

W. J. Aumiller	12 shares
A. H. Bair	80 "
Pearl M. Baker	25 "
W. A. Bell	320 "
Joseph L. Boucher.....	50 "
Geo. H. Bradshaw	450 "
Joe L. Clift	47 "
Anna V. Corpron	150 "
Mrs. W. E. Coumbe.....	40 "
Earl Cowin	59 "
Jessie L. Craig	25 "
H. F. Crawford	67 "
W. L. Dimmick.....	420 "
C. R. Donovan.....	381 "
Frank Eberle	100 "
Grace G. Eglin.....	50 "
Guaranty Trust Co., Trustee for Arthur A. and Elizabeth Aves.....	500 "
Guaranty Trust Co., Trustee for Geo. H. and Florence Bradshaw	67 "
Guaranty Trust Co., Trustee for Eugene D. & Elaine B. Ivy.....	100 "
Guaranty Trust Co., Trustee for Fanny S. Jones	50 "
Guaranty Trust Co., Trustee under Will of Owen Jones, Deceased.....	50 "
Guaranty Trust Co., Trustee for Amelia and Pat Jordan.....	133 "
Guaranty Trust Co., Trustee for Irvine Longbottom	150 "
Guaranty Trust Co., Trustee for Jane M. Reed and Emily Judson Reed.....	133 "
Guaranty Trust Col, Trustee for Sadie Wiley	661½ "
R. M. Hardy.....	7,372 "
Annie Harvey	133 "
Margaret Hawkins	67 "
Eugene D. Ivy.....	109 "
Lawrence Jacobson	100 "

Plaintiff's Exhibit No. 15—(Continued)

J. D. Keck.....	380 shares
	[285]
Joseph P. Kohls.....	160 “
Edward B. Leekey.....	175 “
E. Logan	67 “
Bessie McPhee	27 “
Minnie F. McPhee.....	27 “
J. E. Ott.....	50 “
Dwight R. Redman.....	900 “
E. E. Samson.....	100 “
Edgar L. Sears.....	100 “
A. D. Sloan.....	2,000 “
W. F. Tuesley.....	300 “
Harry W. Winchester.....	67 “
Yakima Natl. Bank & V. O. Nichoson, Trus- tees	40 “
Yakima Securities Co.....	368 “
Total.....	16,107 Shares

The Chairman thereupon, in accordance with the provisions of the By-Laws, appointed C. H. Van Amburg and J. D. Keck to check the number of shares represented in person and also to check the proxies and ascertain the number of shares represented by proxy.

After making such check, the Committee reported that there were 16,107 shares represented in person in accordance with the roll-call and that the following stockholders were represented by proxy:

Ida H. Archibald.....	117 shares
J. K. or G. M. L. Arrowsmith.....	27 “
Minnie Atkinson	50 “
Blass & Co.....	666 “
Ruth M. Boucher.....	10 “
Cecil K. Bowen.....	45 “
Aude W. Bowen.....	44 “

Plaintiff's Exhibit No. 15—(Continued)

Maude B. Bradshaw.....	38	shares
Wm. B. Bradshaw.....	350	"
Mrs. Marion C. Briggs.....	25	"
Jessie Brown	15	"
Margaret Brown	15	"
Lyman J. Bunting.....	50	"
C. B. Burpee.....	40	"
E. J. Carpenter.....	67	"
Frank Carpenter	100	"
Walter Clift	120	"
Walter F. Clift.....	12	"
Jessie Scott Cline.....	150	"
O. K. Conant.....	80	"
Winifred N. Congdon Estate.....	106	"
Arthur F. Conlon.....	500	"
Paul B. Cooper.....	250	"
W. W. deVeaux.....	127	"
Anna M. Donovan.....	75	"
Frank J. or Mary E. Donovan.....	80	"
Wm. B. Dudley.....	453	"
F. A. Duncan.....	520	"
John N. Faust.....	50	"
First Seattle Dexter Horton Natl. Bank, Trustee under agreement with Nelson Rich	250	"
A. G. Fleming.....	400	"
E. M. Ford.....	80	"
W. P. Fuller & Co.....	20	"
F. V. Glaetzner.....	80	"
A. W. Goofman.....	27	"
Jessie M. Harris.....	150	"
Pearle L. Hibarger.....	13	"
Ross P. Hewes.....	2	"
Anne S. Hiscock.....	167	"
Thorp Hiscock	266	"
E. P. Hoffman.....	116	"
Emily Judson Reed Hooper.....	66	"
Ruth L. Huebner.....	20	"
Henrietta B. Hunt.....	5	"

[286]

Harry V. and/or Grace Irish.....	240	"
Grace Irish	250	"

Plaintiff's Exhibit No. 15—(Continued)

Harry Irish	100	shares
H. W. Johnson.....	100	"
Hattie E. Keck, deceased.....	330	"
Alverta Kincaid	50	"
Theodore Knutson	7	"
A. E. Larson Estate.....	5205.8125	"
E. J. Lemke.....	33	"
Eunice Evans Lockwood.....	25	"
A. R. Lutz.....	13	"
W. G. Martin.....	333	"
May Nursery Co.....	7	"
Tom C. Mead.....	12	"
Mrs. Laura M. Meigs.....	250	"
Hattie B. Melaik.....	13	"
Cort F. Meyer.....	1,400	"
Alexander Miller	2,180	"
Lila J. Miller.....	147	"
Wm. F. Miller.....	25	"
J. P. McCafferty.....	67	"
W. H. McCullough.....	2	"
Angus McPherson	130	"
Annie McPherson	120	"
Sutherland Perkins	501½	"
Margaret Porter	67	"
Los B. Raymond.....	25	"
F. M. Raymond.....	210½	"
Elizabeth M. Raymond.....	50	"
Addie Reed	267	"
Bertha M. Rehmke or Henrietta Rehmke Cejudo	33	"
Bertha M. Rehmke or Anna R. Arocha.....	33	"
W. F. G. Rice, deceased.....	307	"
Hannah M. Richardson.....	175	"
Amanda M. Rinehard.....	133	"
W. H. Robertson.....	204	"
W. W. Robertson.....	5,293	"
Leslie S. Rosser.....	13	"
Frank Sanford	11	"
Alice B. Scudder.....	38	"
Julia R. Scudder.....	542	"
Lucy R. Scudder.....	30	"

Plaintiff's Exhibit No. 15—(Continued)

Anna Lou Seerest.....	60	shares
Claribel V. Sharkey.....	177	"
Carrie J. Sindall.....	50	"
R. E. Slaughter.....	1,550	"
Clara J. Sloan.....	800	"
Eva Brown Snyder.....	67	"
W. E. Starkey.....	5	"
W. L. Steinweg.....	1,387	"
C. H. Stewart.....	200	"
A. L. Strong.....	50	"
Maude E. Tennant.....	797	"
W. H. Thede.....	7	"
Mary Della Urquhart	100	"
James T. Urquhart.....	20	"
Valley Iron Works.....	120	"
Katherine E. Van Slyke.....	13	"
C. C. Weber.....	50	"
Bruce Wees	300	"
F. S. Wenner.....	100	"
Mary Alice Wenner.....	333	"
Laurence Wharton	150	"
Elizabeth S. Williams and Florence Eliza- beth, Trustee, etc.	130	"
Wallis B. Williams.....	133	"
Helen S. Williamson.....	275	"
W. Clifford Wright and Helen Wright Hawkes	47	"

 31,287.8125 shares

[287]

A total of all the stockholders represented either in person or by proxy was *was* 47,394.8125. The Chairman thereupon announced that a quorum of stock was represented and that the meeting should proceed.

A motion was made by Mr. Slaon, seconded by Mr. Eberle, that the notice calling the meeting be made a part of the minutes. Carried.

Plaintiff's Exhibit No. 15—(Continued)

The Chairman then asked the Secretary to read the minutes of the last annual meeting, which he did, and it was duly moved, seconded and carried, that the minutes be approved as read.

The Chairman thereupon called upon the Secretary to read the financial statement of the Corporation, together with the report of the Auditor and he submitted the following:

Plaintiff's Exhibit No. 15—(Continued)

STATEMENT
January 7th, 1935

Assets

Cash in Bank.....	\$	10,144.23	
Notes Receivable.....		2,145.00	
Stock Investments:			
1519 Shares Guaranty Trust Co.....	\$	303,300.00	
4837½ " Yakima First Natl. Bank		912,000.00	
230 " First Natl. Bank, Wapato.....		52,267.50	
		1,267,567.50	
Other Stock Investments.....		61,451.50	
Real Estate.....		69,000.00	\$1,410,308.23

Liabilities

Notes Payable.....	\$	50,000.00	
Capital Account (Represented by 64,072.8125 shares of No Par Value Stock issued).....		1,281,456.25	
Undivided Profits.....		851.98	
Reserves.....		78,000.00	\$1,410,308.23

Plaintiff's Exhibit No. 15—(Continued)

Certificate

This is to certify that the assets and liabilities as reflected by the above statement have been examined, and that the amounts reported therein agree with the respective amounts as shown by the books and records of the corporation.

The certificates of stock representing shares owned, as well as evidence of other assets, as indicated by the statement are on hand.

E. P. HOFFMAN,

Auditor

After reading the report, the Chairman reviewed conditions that had prevailed during the past year and commented on conditions as they appeared at this date, expressing the opinion that the institutions comprising the Holding Corporation were in good condition and had made good progress during the past year, but that the directors of the various institutions had considered it unwise to declare dividends, preferring to strengthen the financial position of the institutions against any possible further adverse conditions. He then invited the stockholders present to express their views on conditions and to ask any questions they saw fit regarding the Holding Corporation or its member institutions and in accordance with this invitation the following stockholders participated in the general discussion: Mr. Van Amburg, W. A. Bell, E. E. Samson and Geo. H. Bradshaw, with some of the other stockholders asking questions regarding particular mat-

Plaintiff's Exhibit No. 15—(Continued)

ters. It was then moved by Mr. Bell seconded by Walter Tuesley that the financial statement and the auditor's report be accepted and approved and be incorporated in the minutes of this meeting.

Mr. Hardy then stated that the next order of business was the election of a board of directors for the ensuing year and took the opportunity to point out that a vacancy had resulted on the board through the death of Mr. A. E. Larson. He expressed the feelings of himself and the other directors at the loss of Mr. Larson, who had been a very valued member of the board. It was then moved by Mr. Bell, [288] seconded by Mr. Keck that the directors for the ensuing year consist of: A. G. Fleming, J. J. Crawford, R. M. Hardy, J. P. Kohls, A. D. Sloan, J. L. Clift, Alex Miller, L. R. Rightmire, J. A. Loudon, B. A. Perham and Geo. H. Bradshaw. There being no other nominations the motion was put and unanimously carried. The Chairman thereupon declared the following to be the duly elected Directors of the Corporation, to hold office for the ensuing year and until their successors are elected and qualify:

A. G. Fleming

J. L. Clift

J. J. Crawford

Alex Miller

R. M. Hardy

L. R. Rightmire

J. P. Kohls

J. A. Loudon

A. D. Sloan

B. A. Perham

Geo. H. Bradshaw

Plaintiff's Exhibit No. 15—(Continued)

There being no further business, the meeting adjourned.

R. M. HARDY,
President

Attest:

GEO. H. BRADSHAW
Secretary. [289]

A meeting of the executive committee of the Yakima Holding Corporation was held in the office of the Yakima First National Bank on Friday, April 12, 1935, at 3:00 P. M.

There present Messrs. Hardy, Bradshaw, Rightmire and Clift.

Mr. Hardy stated there were several matters that required action by the executive committee and stated that the first matter was a proposal to Mr. Alex Miller to exchange 4000 shares of stock of the Yakima Holding Corporation for 5000 shares of Sunshine Mining Company stock on the basis of placing a value of \$15.00 per share on the stock of the Holding Corporation and \$12.00 per share on the stock of the Sunshine Mining Company. This proposal was made to Mr. Miller under date of December 11, 1934 and accepted by him. It was then moved by Mr. Clift, seconded by Mr. Rightmire, that we approve and ratify the proposal for the exchange of stock as outlined and authorize its completion. Carried.

The secretary then stated that at the time this transaction with Mr. Miller was discussed by the

Plaintiff's Exhibit No. 15—(Continued)

officers an understanding was reached that if the transaction were completed that the Yakima First National Bank would take over from the Yakima Holding Corporation the 5000 shares of Sunshine at \$15.00 per share; also the 7500 shares of Sunshine stock already owned by the Yakima Holding Corporation at the cost price of same, all in accordance with a letter setting out this understanding dated December 12, 1934 from the secretary to the bank and approved by the bank.

It was then moved by Mr. Rightmire, seconded by Mr. Clift, that the arrangement between the Holding Corporation and the bank as outlined by the secretary be approved and ratified, which motion being put was unanimously approved.

The secretary then pointed out that it would be necessary to issue some new stock to Mr. Miller in fulfillment of the transaction and that inasmuch as the price fixed for the sale of capital stock had been previously fixed at \$20.00 per share, it would be necessary to have a resolution approving the issuance of any new stock at \$15.00 per share. It was then moved by Mr. Bradshaw, seconded by Mr. Rightmire that in order to consummate certain plans of reorganization that had been under consideration by the officers of the company for some time that it was necessary that some additional stock of the corporation be disposed of and that in view of changed economic conditions it would be necessary to fix a lower price than the \$20.00 per share provided for in previous issues of stock and that we

Plaintiff's Exhibit No. 15—(Continued)

now authorize the issuance of such additional stock as may be necessary to complete the transaction with Mr. Miller at a price of \$15.00 per share, and also authorize the disposal of such other stock as may be necessary to carry out the contemplated plans of reorganization at a price of \$15.00 per share. This motion being put was unanimously approved. [290]

A discussion then ensued as to what should be done with the funds to be derived from the sale of the two lots of Sunshine Mining stock when delivery had been made. It was then moved by Mr. Clift, seconded by Mr. Rightmire, that inasmuch as the company had a liability to the First Security and Loan Company carried under the heading of Reserve Account in the financial statement of \$78,000.00, that this amount be paid to the First Security & Loan Company in satisfaction of that obligation. This motion being put was unanimously approved.

The secretary then pointed out that the First Security and Loan Company held a total of 1119 shares of the stock of the Yakima Holding Corporation among its assets and that in order to liquidate its liabilities it was necessary to dispose of this stock and suggested that the company should purchase this stock from the First Security and Loan Company at a price of \$15.00 per share, and that the stock so acquired be used as part of the stock to be transferred to Mr. Miller. It was then moved by Mr. Clift, seconded by Mr. Rightmire, that we

Plaintiff's Exhibit No. 15—(Continued)

authorize the purchase from the First Security and Loan Company of 1119 shares of capital stock of the Yakima Holding Corporation at \$15.00 per share for the purpose of transferring the same to Mr. Alex Miller as part of his purchase of capital stock. This motion being put was unanimously approved.

A discussion then ensued as to what should be done with the remaining funds on hand and the secretary suggested that it would be in keeping with the completion of the plans of reorganization that had been under consideration that the company purchase from the Yakima First National Bank some of its notes, and that he had conferred with the officials of the bank and had obtained a list of notes as follows:

Ernest F. Berg and wife, \$9,000.00, dated May 7, 1935

L. A. Dash, \$2,840.00, dated January 1, 1934

Harry Coonse, \$525.88, dated April 19, 1935

Harry Coonse, \$2,000.00, dated March 12, 1935

Dexter Cahoon and wife, \$1,850.00, April 1, 1935

Wapato Fruit & Cold Stg. Co., \$10,000.00, dated Jan. 28, 1935

Wapato Fruit & Cold Stg. Co., \$521.47, dated Jan. 28, 1935

After consideration of this matter, it was moved by Mr. Bradshaw, seconded by Mr. Clift that we

Plaintiff's Exhibit No. 15—(Continued)
authorize the purchase from the Yakima First National Bank of the group of notes submitted by the secretary. This motion being put was unanimously approved.

There being no further business, the meeting adjourned.

R. M. HARDY

President

Attest:

GEO. H. BRADSHAW

Secretary [291]

PLAINTIFF'S EXHIBIT No. 16

Yakima Holding Corporation

December 11, 1934

Mr. Alex Miller

Yakima, Washington.

Dear Sir:

Referring to conversations which we have had recently regarding an exchange of some stock of the Yakima Holding Corporation for stock of the Sunshine Mining Company, I wish now to make the definite proposition that we will exchange four thousand shares of Yakima Holding Corporation stock for five thousand shares of Sunshine Mining Company stock. This is putting a value of \$15.00

per share on the stock of the Holding Company
and \$12.00 per share on the stock of Sunshine.

Yours very truly,

GEO. H. BRADSHAW

Secretary.

GHB:M

Ap. 25.35

Delivered Sunshine Cert. for
5000 shares to Mr. Hardy

GHB [292]

PLAINTIFF'S EXHIBIT No. 17

December 11, 1934

Mr. Geo. H. Bradshaw, Secretary,
Yakima Holding Corporation,
Yakima, Washington.

Dear Sir:

Referring to your letter of this date, in which
you offer to exchange four thousand shares of Yak-
ima Holding Corporation stock for five thousand of
Sunshine Mining stock, I wish to advise you of my
acceptance of this offer of exchange.

Yours very truly,

ALEX MILLER [293]

PLAINTIFF'S EXHIBIT No. 18

December 11, 1934

Guaranty Trust Company,
Yakima, Washington.

Gentlemen:

I am handing you herewith a certificate for five thousand shares of the stock of the Sunshine Mining Company, which I authorize you to deliver to the Yakima Holding Corporation in exchange for a certificate for four thousand shares of its capital stock.

I wish, however, to make it a condition that this exchange will not be completed unless a sum sufficient to make the total of new money to be provided, for the Yakima Holding Corporation equals a sum of at least \$200,000.00, and to be completed by March 1, 1935.

Yours very truly,

ALEX MILLER [294]

PLAINTIFF'S EXHIBIT No. 19

Yakima Holding Corporation

Capital Paid in \$1,400,000.00

R. M. Hardy, President

Alex Miller, Vice Pres.

Geo. H. Bradshaw, Secretary

A. E. Larson, Treasurer

Yakima, Washington

December 12, 1934

Yakima First National Bank,
Yakima, Washington.

Gentlemen:

In order to confirm an undertaking we have had with the bank regarding the purchase of 7500 shares of Sunshine Mining Company stock, I thought it advisable to write this letter. It was understood that this stock was to be purchased by the Yakima Holding Corporation and held by it for the account of the bank. The Yakima Holding Corporation was to be reimbursed for the amount actually paid for the stock, plus a small appreciation to be determined at the end of the year if this should be deemed necessary. We, therefore, treated this stock as being held for the bank, and if any loss results it is to be the loss of the bank and, of course, if any profit results it will likewise accrue to the bank.

I am taking this opportunity also of setting out the understanding reached in connection with the proposal submitted by us to Mr. Alexander Miller to exchange 4000 shares of stock of the Yakima

Holding Corporation for 5000 shares of stock of the Sunshine Mining Company. We are doing this on the express understanding that stock of the Sunshine Mining Company will be taken over by the bank at the stipulated price of \$12.00 per share. This understanding is to apply to any further similar transactions.

I would ask you to signify that this is also in accordance with your understanding of these transactions by signing the acknowledgment on the bottom of this letter.

. Yours very truly,

GEO. H. BRADSHAW

Secretary.

GHB:M

The above represents the understanding that has been reached between the bank and the Yakima Holding Corporation with respect to the matters set out above and the same is hereby approved.

YAKIMA FIRST NATIONAL
BANK

By H. F. CRAWFORD

Cashier [295]

PLAINTIFF'S EXHIBIT No. 20

YAKIMA FIRST NATIONAL BANK 98-22-12

Member Federal Reserve System

Yakima, Washington Apr 30 1935 No. 59004

Pay to the Order of Yakima Holding Corp.....\$61451.50
Yakima First \$61,451 & 50 Cts.....Dollars
Nat'l Bank

Cashier's Check

F. V. GLAETZNER

Vice-President

Asst. Cashier

(Endorsements)

Pay to the Order of Yakima First National Bank

371 Yakima, Wash 371

Yakima Holding Corporation

98 P D 22

*5. *1.35

YAKIMA FIRST NATIONAL BANK 98-22-12

Member Federal Reserve System

Yakima, Washington Apr 30 1935 No. 59005

Pay to the Order of Yakima Holding Corp.....\$60000.00
Yakima First \$60000 & 00 Cts.....Dollars
Nat'l Bank

Cashier's Check

F. V. GLAETZNER

Vice-President

Asst. Cashier

(Endorsements)

Pay to the Order of Yakima First National Bank

371 Yakima, Wash 371

Yakima Holding Corporation

98 P D 22

*5. *1.35

PLAINTIFF'S EXHIBIT No. 21

YAKIMA FIRST NATIONAL BANK 98-22-12

Member Federal Reserve System

Yakima, Washington, May 1-1935 No. 59022

Pay to the Order of Yakima First Nat'l Bank,

Yakima, Wash.\$71137.96

Yakima First \$71137 & 96 Cts.....Dollars
Nat'l Bank

Cashier's Check

F. V. GLAETZNER

Vice-President

Asst. Cashier

(Endorsements)

May 2, 1935 to Undivided Profits Yakima First National
Bank By E. P. Hoffman Asst. Vice President

98 P D 22

*5. *2.35

YAKIMA FIRST NATIONAL BANK 98-22-12

Member Federal Reserve System

Yakima, Washington Apr 30 1935 No 59006

Pay to the Order of Yakima Holding Corp. or.....\$6635.99

Yakima First Nat Bank

Yakima First

Nat'l Bank \$6635 & 99 Cts.....Dollars

Cashier's Check

F. V. GLAETZNER

Vice-President

Asst. Cashier

(Endorsements)

May 2, 1935 to Undivided Profits Yakima First National
Bank By E. P. Hoffman Asst. Vice President

98 P D 22

*5. *2.35

PLAINTIFF'S EXHIBIT No. 22

Stocks Bonds Date 4-30/35
Securities

A/C Sales Sunshine Mining Co. Stock 61451 50
do 60000 -

121451 50

Credit (First National Bank)
OK (Paid Apr 30 1935)
E.P.H. (General Ledger)
(Yakima, Wash.)

Original Deposit (K)
Deposited Ticket
With (B)
Yakima First National Bank Yakima, Washington
Yakima Holding Corp May 1 1935

In receiving items for deposit or collection, this bank acts only as depositor's collecting agent and assumes no responsibility beyond the exercise of due care. All items are credited subject to final payment in cash or solvent credits. This bank will not be liable for default or negligence of its duly selected correspondents, nor for losses in transit and each correspondent so selected shall not be liable except for its own negligence. This bank or its correspondents may send items, directly or indirectly, to any bank, including the payor, and accept its draft or credit as conditional payment in lieu of cash; it may charge back any item at any time before final payment, whether returned or not, also any item drawn on this bank not good at close of business on day deposited.

Please List Each Check Separately

Currency

Silver

Checks

	Dollars	Cents
Y F N B	61451	50
"	60000	—
J D Keck	13	20
	<hr/> 121464	70

Not Negotiable—Return with book for Entry
YAKIMA FIRST NATIONAL BANK

By

PLAINTIFF'S EXHIBIT No. 23

UNDIVIDED PROFITS

Date—May 2, 1935

Credit O.K.—E.P.H.

Cashiers check #59006..... 6,635.99

Cashiers check #59022.....71,137.96

Yakima First National Bank Paid 77,773.95

May-2 1935 General Ledger Yakima Wash.

PLAINTIFF'S EXHIBIT No. 24

Customers' Securities Department
The Chase National Bank of the City of New York

Delivery Date—12/2/38

S 66132

Accommodation service rendered by The Chase National Bank of the City of New York, acting solely as agent for customer named hereon.

According to your instructions of L 11/23/38 the following securities have been sold for your account and risk to or through the following broker or dealer. Fenner and Beane.

New York 11/28/38

Principal

1500 Shs. Sunshine Mining Co. Capital \$10 Par.....\$15,175.00

400 shs at 10 $\frac{1}{4}$

600 shs at 10 $\frac{1}{8}$

500 shs at 10

Plus Interest .....	.....
Less Tax	\$45.44
Comm. Paid Above Broker	\$210.00
	<hr/> \$14,919.56

Chase overhead Charge for clearing	
Securities	\$1.50
Net Amount	<hr/> \$14,918.06

[297]

To THE NATIONAL BANK OF COMMERCE OF SEATTLE
YAKIMA BRANCH, YAKIMA, WASHINGTON

We shall Deliver Securities () From Safekeeping (x)
Enclosed with your letter

Information regarding the hours between which the trans-
action(s) listed hereon took place will be furnished upon writ-
ten request.

This Is Not an Advice of Credit

Agt/FB
THE CHASE NATIONAL BANK
OF THE CITY OF NEW YORK
Agent.

C. Sec. 1 S. 8-36 You will be advised further when delivery
is made and proceeds are received.

[298]

PLAINTIFF'S EXHIBIT No. 25

Key

SPAD—Special *Davice*
 REDS—Re-Discount
 CSLT—Cash Letter
 RT—Return
 TR—Transfer
 DF—Draft
 RM—Remittance
 CL—Collection
 DS—Discount

ER—Error Corrected
 NT—Note
 CS—Cash
 EX—Exchange
 DU—Due
 BD—Bonds
 CH—Charge
 RF—Refund
 IN—Interest

General Ledger

Yakima First National Bank
 Yakima, Washington

UNDIVIDED PROFITS

Sheet No. 4

Old Balance	Date	Description	Debit	Credit	New Balance
					22,448.37 S
22,448.37 S	Dec 31 '34	B. R. 38314 F. M. Balcom Dated Dec. 14, 34 Due 3-12-35	1,192.00		
	Dec 31 '34	" 37047 F. M. Balcom " 9-27-34 Due 12-26-34	5,000.00		
	Dec 31 '34	" 37698 F. M. Balcom " 11- 5-34 " 2- 3-35	3,000.00		
	Dec 31 '34	" 37699 " " " 11- 5-34 " 2- 3-35	3,083.57		
	Dec 31 '34	" 37845 " " " 11-16-34 " 2-14-35	2,500.00		
	Dec 31 '34	" 38315 " " " 12-14-34 " 3-12-35	642.60		
	Dec 31 '34	Salaries & Wages.....	37,447.00		
7,030.20	Dec 31 '34	Taxes	2,563.90		
	Dec 31 '34	All other Expenses	9,732.21		
	Dec 31 '34	Interest Paid	46,658.60		
	Dec 31 '34	Cash Short	237.28		
	Dec 31 '34	Interest & Discount		93,202.67	
	Dec 31 '34	Service Charge on Notes.....		145.00	
	Dec 31 '34	Cash Collections		2,441.91	
	Dec 31 '34	U. S. & Other U. S. Bonds		24,484.60	
	Dec 31 '34	State & Municipal Bonds.....		12,747.62	
	Dec 31 '34	Federal Mortgage Bonds.....		94.29	
	Dec 31 '34	County Warrants		9,007.11	
	Dec 31 '34	Taxable Bonds		7,252.76	
	Dec 31 '34	Bank Balances		47.42	
	Dec 31 '34	Federal Reserve Bank Dividend.....		540.00	
	Dec 31 '34	Exchange		4,532.05	
	Dec 31 '34	Box Rent		3,858.98	
	Dec 31 '34	Service Charges on N.S.F. Checks.....		415.50	
	Dec 31 '34	Service Charges		5,885.83	
	Dec 31 '34	Protest Fees		97.41	
	Dec 31 '34	Night Depository Rent.....		180.00	
	Dec 31 '34	Exchange on out of town checks.....		54.15	
	Dec 31 '34	Trust Department Fees.....		5,263.75	
					80,642.26 Cr

Opencell notation

[299]

Sheet No. 4 (Cont.)

Old Balance	Date	Description	Debit	Credit	New Balance
40,642.26	Jan 9 '35	Judgements Guaranty Trust Co. Receivors Vs Bank.....	5,191.04	Yakima Fruit & Cold Storage	75,451.22 Cr
75,451.22	Jan 17 '35	U. S. Treasury Check # 15637 Forged Endorsement.....	41.30		75,409.92 Cr
75,409.92	Jan 18 '35	Reeovered Coupons 2nd L. L Bond Cashed 7-29-33.....		9.56	75,419.48 Cr
75,419.48	Jan 26 '35	Republic of Finland 51½ Due 2-1-58 called for 2-1-35 Carried at \$5,188.75 Par 7,000.00		1,811.25	77,230.73 Cr.
77,230.73	Jan 30 '35	To Bond Reserve.....	1,811.25		75,419.48 Cr
75,419.48	Jan 30 '35	100M Par U. S. Treas 3¾ Carried 102M Sold 105,687.50).....	3,687.50		
	Jan 30 '35	100M Par U. S. Treas 3¾ 1941-43 Sold First Boston @ 105 Carried 102M		3,687.50	75,419.48 Cr
75,419.48	Jan 31 '35	40M U. S. Treas. 3¾ Sold 1st Boston @ 105.50 40-43	1,678.14	Carried 40,521.86	
	Jan 31 '35	40M U. S. " 3¼ 1937 Sold 1st Boston @ 105.5975	2,237.50	" 40,000.00	
	Jan 31 '35	70M U. S. " 3¾ 43-47 Sold 1st Boston @ 105.375	1,750.00	" 72,012.50	
	Jan 31 '35	165M U. S. " 3¾ 43-47 " " " @ 105.375	4,125.00	" 169,743.75	
	Jan 31 '35	100M U. S. " 3¾ 40-43 " " " @ 105.50	3,500.00	" 102,000.00	
	Jan 31 '35	165M U. S. " 3¾ 43-47 " " "		4,125.00	
	Jan 31 '35	100M U. S. " 3¾ 40-43 " " "		3,500.00	
	Jan 31 '35	40M U. S. " 3¾ 40-43 " " "		1,678.14	
	Jan 31 '35				
	Jan 31 '35	40M U. S. " 3¼- 1937 " " "		2,237.50	
	Jan 31 '35	70M U. S. " 43-47 3¾ " " "		1,750.00	75,419.48 Cr
75,419.48					75,419.48 Cr [300]

Key	General Ledger
SPAD—Special Advice	ER—Error Corrected
REDS—Re-Discount	NT—Note
CSLT—Cash Letter	CS—Cash
RT—Return	EX—Exchange
TR—Transfer	DU—Due
DF—Draft	BD—Bonds
RM—Remittance	CH—Charge
CL—Collection	RF—Refund
DS—Discount	IN—Interest

Yakima First National Bank
Yakima, Washington

UNDIVIDED PROFITS

Sheet No. 5

Old Balance	Date	Description	Debit	Credit	New Balance
					75,419.48 Cr
75,419.48 Cr	Feb 4 '35	35M US Treas. 31 $\frac{1}{4}$ 46-49 Sold 1st Boston @ 103.12/32	1,181.25	Carried Par	
	Feb 4 '35	200M US " 31 $\frac{1}{4}$ 45 " " " @ 103.26/32	875.00	" 206,750.00	
	Feb 4 '35	35M US " 31 $\frac{1}{4}$ 46-49 " " " @ 103.12/32 Par		1,181.25	
	Feb 4 '35	200M US " 31 $\frac{1}{4}$ 45 " " " @ 103.26/32 Carried 206,750.00		875.00	
75,419.48	Feb 6 '35	100M US " 2 $\frac{1}{8}$ 39 " " " @ 101.27/32	531.25	Carried 101,312.50	
	Feb 6 '35	40M US " 3 46-48 " " " @ 102.6/32	875.00	" Par	
	Feb 6 '35	118M US " 2 $\frac{1}{8}$ 39 " " " @ 101.27/32	2,175.63	" Par	
	Feb 6 '35	100M US " 2 $\frac{1}{8}$ 39 " " " @ 101.27/32 Carried 101,312.50		531.25	
	Feb 6 '35	40M US " 3 46-48 " " " @ 102.6/32 " Par		875.00	
	Feb 6 '35	118M US " 2 $\frac{1}{8}$ 39 " " " @ 101.27/32 " Par		2,175.63	
75,419.48	Mar 4 '35	25M Philippine Pub. Impr. 4 1935 Matured 3-1-35	851.70	851.70	
75,419.48	Mar 29 '35	Loss on Yakima-Benton Drg. Dist #1 Maintenance Warrants	63.16	60c on Dollar	
75,356.32	Apr 2 '35	2300 1st L. L. 31 $\frac{1}{4}$ 46 1947 Sold 101.21875 Book 101.875	15.10		
	Apr 2 '35	2700 1st L. L. 41 $\frac{1}{4}$ 46 1947 Sold 101.3125 Book 102.90625	43.03		
	Apr 2 '35	250 Par 1st L. L. 41 $\frac{1}{4}$ 1947 Sold 100 $\frac{1}{4}$ Book 102.90625	7.64		
75,290.55	Apr 29 '35	Recovery on note of S. J. Narboe #27070 Due 2-18-33		250.00	
75,540.55	May 2 '35	Cashier's Checks #59006 & 59022		77,773.95	
		First Security & Loan Corp Bonds written off:			
		Balance of Bond #23 218.08			
		In full bonds #24-33 inc. 50,000.00			
	May 2 '35	Part on bond #34 4,996.92	55,215.00		
98,099.50	May 2 '35	Dep on Bank Bldg. for years 1932 & 1933	18,897.20		
	May 2 '35	Dep not taken for 1933 on Furn & Fix.	1,462.24		
77,740.06	May 3 '35	10M Alleghany Corp 5's 1944 @ 70.03 Carried \$6,943.75 Sold	59.60		
	May 3 '35	10M Assoc. Tel. Utilities 5 $\frac{1}{2}$ 1944 @ 16.96 Carried \$1,300.00	396.00	Carried	
	May 3 '35	Sold 10M Alleghany Corp 5s 1944 @ 10.01 Carried \$6,943.75		59.60	
	May 3 '35	Sold 10M Assoc. Tel. Utilities 5 $\frac{1}{2}$ 1944 @ 16.96 Carried \$1,300.00		396.00	
77,740.06	May 3 '35	J. R. Schwartz Loan #39541—\$4,501.55 Due May 29, 35	2,000.00	Comptrollers Letter	
75,740.06	May 6 '35	Harry Coonse Note #40509 Dated Apr. 19, 35 Due 7-18-35	200.00		
75,540.06	May 8 '35	Sold Yak Water Bds. 5's 1948-49 Carried 99 Sold 109.50	1,575.00		
	May 8 '35	Sold Yak Water Bds. 5's 1948-49 Carried 99 Sold 109.50		1,575.00	
					75,540.06 Cr

Sheet No. 5 (Cont.)

Old Balance	Date	Description	Debit	Credit	New Balance
75,540.06	May 10, '35	Sold Yak Water Bds. 5's 1949-50 Sold @ 109.50 Carried @ 99 Profit.....		1,890.00	
	May 10 '35	Sold Yak Water Bds. 5's 1949-50 Sold @ 109.50 Carried @ 99 Profit.....	1,890.00		75,540.06 Cr
75,540.06	May 14 '35	Sold 10M Richfield Oil Co 6's 1944 @ 32 1/4 less cost 3195.20.....	195.20	Carried 3,000.00	
	May 14 '35	Sold 10M Richfield Oil Co 6's 1944 @ 32 1/4 less cost Profit		195.20	75,540.06 Cr
75,540.06	May 18 '35	Sold 12M Par Yak. Water Revenue 5's 1950-51 @ 109.50 Carried @ 99.....			
	May 18 '35	Sold 12M Par Yak. Water Revenue 5's 1950-51 @ 109.50 Carried @ 99.....	1,260.00		75,540.06 Cr
75,540.06	May 20 '35	Sold 10M Canadian Nat'l Ry. 5% 1969 Carried @ \$10,425. net \$11,450.....		1,025.00	
	May 20 '35	Sold 10M Chesapeake Corp. 5% 1947 Carried @ \$9,887.50 Net \$10,371.00.....		483.50	
	May 20 '35	Sold 5M Pacific Gas & Elec. 4 1/2 1960 Carried @ \$4,856.25 Net \$5,298.00.....		441.75	
	May 20 '35	Sold 10M Remington Rand, Inc. 5 1/2 1917 Carried @ \$9,200.00 Net \$10,286.50..		1,083.50	
	May 20 '35	10M Canadian Nat'l Ry. 5% 1969 Carried at \$10,425. Profit.....	1,025.00		
	May 20 '35	10M Chesapeake Corp. 5% 1947 Carried at \$ 9,887.50 Profit.....	483.50		
	May 20 '35	5M Pacific Gas & Elec. 4 1/2 1960 Carried @ \$ 4,856.25 Profit.....	441.75		
	May 20 '35	10M Remington Rand Inc. 5 1/2 1947 Carried @ \$ 9,200.00 Profit.....	1,083.50		75,540.06 Cr

[302]

PLAINTIFF'S EXHIBIT No. 26

United States of America

Treasury Department

Washington

August 2, 1941

Pursuant to the provisions of Section 661, Chapter 17, Title 28 of the United States Code (Section 882 of the Revised Statutes of the United States), I hereby certify that the annexed is a true copy of Corporation Income and Excess-Profits Tax Return for 1935, (with schedules, statement, and balance sheets attached), filed by Joe L. Clift, Liquidating Agent for Yakima First National Bank, Yakima, Washington, on *filed* in this Department.

In Witness Whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury:

✓ [Seal]

F. A. BIRGFELD

Chief Clerk,

Treasury Department. [303]

Plaintiff's Exhibit No. 26—(Continued)

Form 1120	Return Form Marked "Duplicate" Must Be Filed With This Original Return	Page 1 of Return
Treasury Department	CORPORATION INCOME AND EXCESS- PROFITS TAX RETURN	File Code 804
Internal Revenue Service	FOR CALENDAR YEAR 1935	Serial Number 856758
(Auditor's Stamp)	or Fiscal Year begun....., 1935 and ended....., 1936	
	Print Plainly Corporation's Name and Business Address	District—Washington
	Yakima First National Bank Yakima, Washington	(Cashier's Stamp)
Reviewed	It is Essential, Except Where Otherwise Provided in	
Audit Review Division	E the Instructions, That This Form Be Completely	Cash Check M.O.
By H. M. Wells	Filled In Irrespective of Any Statements, Schedules,	Cert. of Ind
Date Jan 29 1940	or Reports Submitted Herewith.	
	Date of Incorporation—1885	First Payment
	Under the Laws of what State or Country—United States.	\$.....

The Corporation's Books are in Care of Its Officers. Located at Yakima, Washington. Kind of Business (in detail)..... Is This a Consolidated Return of Railroad Corporations?..... If so, of How Many

Plaintiff's Exhibit No. 26—(Continued)

Corporations?—None. If a Foreign Corporation, State Whether Resident or Nonresident—No; if Non-resident State Amount of Income Excluded (Instruction 33) From Gross Income—No. Is the Corporation a Personal Holding Company Within the Meaning of Section 351 of the Revenue Act of 1934? (Answer "yes" or "no")—No. (If so, an additional return on Form H must be filed.)

[304]

GROSS INCOME

Item and
Instruction No.

1. Gross Sales (where inventories are an income-determining factor), \$.....; Less Returns and Allowances, \$..... Net Sales \$.....\$.....
2. Less Cost of Goods Sold:
 - (a) Inventory at beginning of year \$.....
 - (b) Material or merchandise bought for manufacture or sale.....
 - (c) Miscellaneous costs (From Schedule A, Column 1):
 - (1) Salaries and wages, \$.....; (2) Other costs, \$.....; Total.....
 - (d) Total of lines (a), (b), and (c) \$.....
 - (e) Less inventory at end of year.....
3. Gross Profit from Sales (Item 1 minus Item 2).....\$.....
4. Gross Receipts (where inventories are not an income determining factor) \$....
5. Less cost of operations (From Schedule A, Column 2):
 - (a) Salaries and wages, \$.....; (b) Other costs, \$.....; Total.....
6. Gross Profit where inventories are not an income-determining factor (Item 4 minus Item 5).....

Plaintiff's Exhibit No. 26—(Continued)

7. Interest on Loans, Notes, Mortgages, Bonds, Bank Deposits, etc.	\$127,225.73
8. Rents	2,162.75
9. Royalties—Exchange, Notary Fees, Service Charges.....	14,677.35
10. Capital Gain or Loss (From Schedule B)—Profit on Bonds Sold.....	69,778.44
11. Interest on Liberty Bonds, etc. (From Schedule L, Lines 2(a)(6) and (7)).....	.....
12. Dividends on Stock of:	
(a) Domestic Corporations subject to taxation under Title I of Revenue Act of 1934.....	.....
(b) Domestic Corporations not subject to taxation under Title I of Revenue Act of 1934.....	277,773.95
(c) Foreign Corporations—Miscellaneous.....	.....
13. Other Income (State nature of income) (Use separate schedule, if necessary)—Recoveries—Trust Fees	11,433.10
14. Total Income in Items 3, and 6 to 13, Inclusive.....	\$503,051.32
[Stamp] Received Collector of Internal Revenue District of Washington Mar. 14-1935 Tacoma Office. [Printer's Note]: In right hand margin figure 83 written in ink.	

[305]

DEDUCTIONS

15. Compensation of Officers (From Schedule C).....	\$ 22,801.25
16. Rent on Business Property.....	.....
17. Repairs (From Schedule D): (a) Salaries and Wages, \$.....; (b) Other Costs, \$..... Total.....	.....

Plaintiff's Exhibit No. 26—(Continued)

18. Interest	\$ 49,080.87	
19. Taxes (From Schedule E).....	5,390.80	
20. Losses by Fire, Storm, etc. (From Schedule F).....	-----	
21. Bad Debts (From Schedule G) ; also bonds determined to be worthless during taxable year (Explain on separate sheet) Losses on Bonds sold and written off..... Losses on Loans written off and forged checks..... Ordinary and necessary expenses.....	104,252.81 227,206.04 16,956.29 -----	
22. Dividends (Item 12 (a) above).....		
23. Depreciation (resulting from exhaustion, wear and tear, or obsolescence) (From Schedule I)—Bank Building..... Furniture Fixtures	6,692.73 796.87	
24. Depletion of Mines, Oil and Gas Wells, Timber, etc. (Submit schedule, see Instruction 24)	-----	
25. Other Deductions Authorized by Law (Explain below, or on separate sheet) : (a) Salaries and wages. (Not included in Items 2, 5, 15, or 17 above)..... (b) Stock determined to be worthless during the taxable year—Bonds written down 1930 1931..... (c) See Schedule Attached..... Total Deductions in Items 15 to 25.....	29,409.00 31,339.88 111,410.56 605,337.20	
26.		
27. Net Income (Item 14 minus Item 26).....		\$ (102,285.88)
		[306]

Plaintiff's Exhibit No. 26—(Continued)

COMPUTATION OF TAX

Income Tax		Excess-Profits Tax*	
28. Net Income (Item 27, above).....	None	35. Net Income for Excess-profits Tax Computation (Item 27, above).....	\$ None
29. Less Interest on Liberty Bonds, etc. (Item 11)	_____	36. Less: 12½% of \$ adjusted declared value of capital stock as shown in your capital-stock tax return for year ended June 30, 1935.....	_____
30. Balance subject to Income Tax (Item 28 minus Item 29).....	\$.....	37. Amount Subject to Excess-profits Tax (Item 35 minus Item 36).....	\$.....
31. Income Tax (13¾% of Item 30) (or 15¾% of Item 30, if this is a consolidated return of railroad corporations)	\$.....	38. Excess-profits Tax (5% of Item 37)....	\$.....
32. Less: Income Tax Paid at Source. (This credit can be allowed only to a nonresident foreign corporation)	\$.....	<p>Note.—Where an affiliated group of railroad corporations makes a consolidated Income Tax return, the common parent corporation and each subsidiary which is liable for the making of an Excess-profits Tax return must make a separate Excess-profits Tax return. (See Instruction 30 and 44.)</p>	
33. Income Tax Paid to a Foreign Country or U. S. Possession by a Domestic Corporation	\$.....		
34. Balance of Income Tax (Item 31 minus Item 32 or 33).....	\$.....	<p>*Corporations having an income-tax fiscal year ending after June 30, 1936, shall use Form 1121 in making Excess-profits Tax returns for such fiscal year.</p>	

A-1

[307]

Plaintiff's Exhibit No. 26—(Continued)

SCHEDULE K—Balance Sheets (See Instruction 42)

Items	Beginning of Taxable Year Amount	End of Taxable Year Amount	Total
Assets			
1. Cash:			
(a) Demand deposits, including checks.....	\$	\$
(b) Time deposits, including certificates of deposit
(c) All other cash.....	\$	\$
2. Notes receivable
3. Accounts receivable	\$	\$
(a) Less reserve for bad debts.....
4. Inventories:			
(a) Raw materials	\$	\$
(b) Work in process.....
(c) Finished goods
(d) Supplies
.....
5. Investments (nontaxable):			
(a) Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia, or United States possession.....	\$	\$

Plaintiff's Exhibit No. 26—(Continued)

Schedule K—Balance Sheets (See Instruction 42)—(Continued)

Items	Beginning of Taxable Year Amount	Total	End of Taxable Year Amount	Total
(b) Obligations issued under Federal Farm Loan Act, or under such Act as amended.....
(c) Liberty 3½% Bonds and other obligations of United States issued on or before Sep- tember 1, 1917.....
(d) Treasury Notes, Treasury Bills, and Treas- ury Certificates of Indebtedness.....
(e) Liberty 4% and 4¼% Bonds, United States Savings Bonds, and Treasury Bonds.....
(f) Obligations of instrumentalities of the United States (other than obligations to be reported in line (b) above).....
6. Other investments:
(a) Stocks of domestic corporations.....	\$	\$	\$	\$
(b) Bonds of domestic corporations.....
(c) Stocks and bonds of foreign corporations.....
(d) All other investments or loans.....
7. Deferred charges:
(a) Prepaid insurance	\$	\$	\$	\$

[308]

Plaintiff's Exhibit No. 26—(Continued)

Schedule K—Balance Sheets (See Instruction 42)—(Continued)

Items	Beginning of Taxable Year Amount	End of Taxable Year Amount	Total
(b) Prepaid taxes
(c) All other
8. Capital assets:			
(a) Buildings	\$		
(b) Machinery and equipment.....		
(c) Furniture and fixtures.....		
(d) Delivery equipment		
(e) Other depreciable assets.....		
(f) Total of Lines (a) to (e).....	\$		
(g) Less reserves for depreciation.....		
(h) Depletable assets	\$		
(i) Less reserves for depletion.....		
(j) Land		
9. Patents		
10. Good will		
			[309]

Plaintiff's Exhibit No. 26—(Continued)

Schedule K—Balance Sheets (See Instruction 42)—(Continued)

Items	Beginning of Taxable Year Amount	Total	End of Taxable Year Amount	Total
18. Other liabilities (describe fully):				
.....	\$		\$	
19. Capital stock:				
(a) Preferred stock (less stock in treasury).....	\$		\$	
(b) Common stock (less stock in treasury).....	
20. Surplus	
21. Undivided profits	\$		\$	
.....	
22. Total Liabilities	
Remarks	

\$ A-2 [310]

Plaintiff's Exhibit No. 26—(Continued)

Page 3 of Return

SCHEDULE L—RECONCILIATION OF NET INCOME
AND ANALYSIS OF CHANGES IN SURPLUS

1. Net income subject to taxation (Item 30, page 1 of return).....	\$102,285.88
2. Nontaxable income:	
(a) Interest on:	
(1) Obligation of a State, Territory, or political subdivision thereof, or the District of Columbia, or United States possession	22,450.20
(2) Obligations issued under Federal Farm Loan Act, or under such Act as amended	728.51
(3) Liberty 3½% Bonds and other obligations of United States issued on or before September 1, 1917.....	None
(4) Treasury Notes, Treasury Bills, and Treasury Certificates of Indebtedness	13,998.05
(5) Liberty 4% and 4¼% Bonds, United States Savings Bonds, and Treasury Bonds owned in the principal amount of \$5,000 and under.....	212.50
(6) Liberty 4% and 4¼% Bonds, United States Savings Bonds, and Treasury Bonds owned in the principal amount of over \$5,000.....	406.41
(7) Obligations of instrumentalities of the United States (other than those to be reported in Line 2 (a) (2) above).....	849.00
(b) Dividends deductible under Section 23 (p) of the Revenue Act of 1934 Fed. Res. Bank Dividend	1,021.94
(c) Proceeds of life insurance policies paid upon the death of the insured Warrants	2,567.23
(d) Other items of nontaxable income (to be detailed):	
(1) Depreciation Furniture and Fixtures	796.87
Bank Building	6,693.73
(2) Sunshine Mining Co. Dividend.....	1,050.00

Plaintiff's Exhibit No. 26—(Continued)

3. Charges against reserve for bad debts, if Item 21, page 1 of return, is not an addition to a reserve	\$.....
4. Charges against reserves for contingencies, etc. (to be detailed):	
(a) See Schedule	111,410.56
(b) See Schedule	31,339.88
5. Total of Lines 1 to 4, inclusive.....	\$ 91,238.00
6. Total from Line 14.....	31,842.83
7. Net profit or loss for year, as shown by books, before any adjustments are made therein (Line 5 minus Line 6) (if loss, indicate).....	\$ 59,395.17
8. Surplus and undivided profits as shown by balance sheet at close of preceding taxable year	180,642.26
9. Other credits to surplus (to be detailed):	
(a) .....	.....
(b) .....	.....
10. Total of Lines 7 to 9, inclusive.....	\$240,037.43
11. Total from Line 17.....	19,262.65
12. Surplus and undivided profits as shown by balance sheet at close of taxable year (Line 10 minus Line 11).....	\$220,774.78
	[311]
13. Unallowable deductions:	
(a) Donations, gratuities, and contributions.....	\$ 437.50
(b) Income and profits taxes paid to the United States, and such taxes paid to its possessions or foreign countries if claimed as a credit in whole or in part in Item 33, page 1 of the return.....	.....
(c) Federal taxes paid on tax-free covenant bonds .....	.....
(b) Special improvement taxes tending to increase the value of the property assessed....	.....
(e) Furniture and fixtures, additions, or betterments treated as expenses on the books.....	.....
(f) Replacements and renewals.....	.....

Plaintiff's Exhibit No. 26—(Continued)

(g) Insurance premiums paid on the life of any officer or employee where the corporation is directly or indirectly a beneficiary	\$.....
(h) Interest on indebtedness incurred or continued to purchase or carry obligations (other than obligations of the United States issued after September 24, 1917, and originally subscribed for by the taxpayer) the interest upon which is wholly exempt from taxation .....	.....
(i) Additions to reserve for bad debts which are not included in Item 21, page 1 of return .....	.....
(j) Additions to reserves for contingencies, etc. (to be detailed):	
(1) Depreciation Bldg. Furniture and fixtures taken previous years.....	31,405.33
(2) .....	.....
(3) .....	.....
(k) Other unallowable deductions (to be detailed):	
(1) .....	.....
(2) .....	.....
(3) .....	.....
14. Total of Line 13.....	\$ 31,842.83
15. Dividends paid during the taxable year (state whether paid in cash, stock of the corporation or other property):	
(a) Date paid 9-17-35 Character Cash.....	\$ 19,262.65
(b) Date paid Character.....	.....
(c) Date paid Character.....	.....
(d) Date paid Character.....	.....
16. Other debits to surplus (to be detailed):	
(a) .....	.....
(b) .....	.....
(c) .....	.....
17. Total of Lines 15 and 16.....	\$ 19,262.65

Plaintiff's Exhibit No. 26—(Continued)

NATURE OF BUSINESS

1. Check the block to indicate the industrial division in which the corporation's main income-producing business falls:

Manufacturing

Food and kindred products:

- () Bakery and confectionery products.
- () Canned products—fish, fruit, vegetables, etc.
- () Mill products—bran, flour, feed.
- () Packing-house products—meats, lard; slaughtering.
- () Sugar-beet, cane, maple; molasses, etc.
- () Other food products—butter substitutes, cereals, coffee, spices, dairy products; ice, etc.
- () Beverages, soft drinks, mineral water.
- () Brewing and distilling—alcohol, liquors, beer, malt extract, wines.
- () Tobacco products.

Textiles:

- () Cotton goods—dress goods, etc.; napping, dyeing.
- () Woolen and worsted goods—dress goods, etc.; wool pulling, scouring.
- () Silk and rayon goods—dress goods, thrown silk, etc.; spinning, warping.
- () Carpets, floor coverings, tapestries, linoleum.
- () Other textiles—cord, felt, fur, linen, artificial leather, surgical textiles, etc.
- () Clothing—custom-made, factory-made, underwear, millinery, etc.
- () Knit goods—sweaters, hosiery, etc.
- () Leather boots, shoes, slippers, etc.
- () Other leather products—saddlery, harness, trunks; finishing, tanning.
- () Rubber tires and tubes.
- () Other rubber goods—boots, shoes, hose, artificial rubber.
- () Bone, celluloid and ivory products.
- () Sawmill and planing mill products.
- () Furniture (not metal).
- () Other wood products—carriages, wagons, baskets, etc.
- () Paper, pulp and products.
- () Printing, publishing, and allied industries.

Plaintiff's Exhibit No. 26—(Continued)

Manufacturing—(Continued)

- () Petroleum and other mineral oil refining and products.
 - () Chemicals proper, acids, compounds, coal tar products, etc.
 - () Allied chemical substances, drugs, oils, soaps, etc.
 - () Paints, pigments, varnishes, etc.
 - () Fertilizers.
 - () Stone, clay, glass, and related products.
- Metal products and processes:
- () Iron and steel—products of blast furnaces, rolling mills, foundries.
 - () Locomotives and railroad equipment.
 - () Motor vehicles, complete or parts.
 - () Machinery—factory, used in producing food, leather, metal, paper, printing, rubber, stone, clay, glass, textile and wood products.
 - () Machinery—agricultural and equipment.
 - () Machinery—electrical and equipment.

[313]

- () Machinery—other, building, construction, gas and mining machinery and equipment.
- () Household equipment—metal furniture, refrigerators, sewing machines, etc.
- () Office equipment.
- () Metal building material and equipment.
- () Hardware, tools, etc.
- () Precious metal, products and processes.
- () Other metals, products and processes.

Miscellaneous manufacturing:

- () Radios, complete or parts.
- () Musical, professional, and scientific instruments; optical goods, small boats.
- () Airplanes, airships, seaplanes; parts.

Nonmanufacturing

Trade:

- () Wholesale.
- () Retail.
- () Wholesale and retail.
- () Commission.
- () Other trade—repair service, garages, etc.

Plaintiff's Exhibit No. 26—(Continued)

Nonmanufacturing—(Continued)

Finance:

- () Banks—national, State, private, savings; jointstock land banks.
- () Stock and bond brokers, investment bankers or brokers.
- () Real estate, realty holding, real estate agents.
- () Insurance companies (not agents).
- () Investment trusts, stock syndicates, stock holding companies.
- () Other finance-loan companies, building and loan associations; note, mortgage or pawn brokers; insurance agents.
- () Agriculture and related industries, including fishing, forestry, ice-harvesting; leasing such properties.
- () Mining and quarrying, including gas and oil wells; leasing such properties.
- () Construction—excavations, bridges, buildings railroads, ships; equipping and installing systems.
- () Transportation—rail, water, serial, motor, etc.; leasing such facilities.
- () Storage — cold storage, grain elevators, warehouses, safe-deposit vaults, etc.
- () Public utilities—electric light or power, gas (artificial or natural) pipe lines, telegraph, telephone, radio, water-works, heat supply, toll bridges, etc.; leasing such utilities.
- () Service—professional, business, amusement, domestic, and all other.

[314]

AFFILIATIONS WITH OTHER CORPORATIONS

(See Instruction 38)

2. Is this a consolidated return?—No. If so, procure from the collector of internal revenue for your district Form 851, Affiliations Schedule, which shall be filled in, sworn to, and filed as a part of this return.

3. Was the income of this corporation included in a consolidated return for the prior year?..... If so, give name of coporation which filed the consolidated return.....

Predecessor Business

4. Did the corporation file a return under the same name

Plaintiff's Exhibit No. 26—(Continued)

for the preceding taxable year?—Yes. Was the corporation in any way an outgrowth, result, continuation, or reorganization of a business or businesses in existence during this or any prior year since December 31, 1917?—Yes. If answer is "yes", give name and address of each predecessor business, and the date of the change in entity—Consolidation of First National Bank and Yakima National Bank, Yakima, Washington. Upon such change were any asset values increased or decreased?..... If the answer is "yes", closing balance sheets of old business and opening balance sheets of new business must be furnished.

Basis of Return

5. Is this return made on the basis of cash receipts and disbursements?—Yes. If not, describe fully what other basis or method was used in computing net income.....

Valuation of Inventories

6. State whether the inventories at the beginning and end of the taxable year were valued at cost, or cost or market, whichever is lower. If other basis was used, describe fully, state why used and the date inventory was last reconciled with stock.....

PREPARATION OF RETURN (See Instruction 47)

7. Did any person or persons advise the corporation in respect of any question or matter affecting any item or schedule of this return, or assist or advise the corporation in the preparation of this return, or actually prepare this return for the corporation? (Answer "yes" or "no")—No. If so, give the name and address of such person or persons and state the nature and extent of the assistance or [315] advice received and the items and schedules in respect of which the assistance or advice was received; if this return was actually prepared by any person or persons other than the corporation, state the source of the information reported in this return and the manner in which it was furnished to or obtained by such person or persons.....

Information Return

8. Did the corporation make a return of information on Forms 1096 and 1099 (see Instruction 53) for the calendar year 1935? (Answer "yes" or "no")—Yes.

Plaintiff's Exhibit No. 26—(Continued)

List of Attached Schedules

9. Enter below a list of all schedules accompanying this return, giving for each a brief title and the schedule number. The name and address of the corporation should be placed on each separate schedule accompanying the return.....

A-3

[316]

SCHEDULE A (See Instructions 2 and 5)

1. Cost of Sales (Where Inventories Are an Income-Determining Factor)

Items	Amount (Enter as Item 2(c))
Salaries and wages	\$.....
Other costs
.....

Items	Amount (Enter as Item 5)
Salaries and wages	\$.....
Other costs
.....

SCHEDULE B—CAPITAL GAINS AND LOSSES

(From Sales or Exchanges Only) (See Instruction 10)

1. Description of Property	2. Date Acquired Mo. Day Year	3. Date Sold Mo. Day Year
.....
.....
.....
.....
.....
4. Gross Sales Price (Contract price)	5. Cost	6. March 1, 1913, Value if Acquired Before That Date
\$.....	\$.....	\$.....
.....
.....
.....
.....

Plaintiff's Exhibit No. 26—(Continued)

7. Cost of Improve- ments After Acqui- sition or March 1, 1913	8. Depreciation Al- lowed (or Allowable) Since Acquisition or March 1, 1913 (Furnish details)	9. Gain or Loss
\$.....	\$.....	\$.....
.....
.....
.....
.....	\$.....

Gain or Loss (enter net amount as Item 10) (capital losses are allowable only to the extent of \$2,000 plus capital gains)..... \$.....

State (1) how property was acquired.....; (2) whether at time of sale or exchange a purchaser owned more than 50% in value of your outstanding stock.....

Every sale or exchange of stock should be reported in detail, including name and address of corporation, class of stock, number of shares, capital changes affecting basis (stock dividends, other nontaxable dividends, stock rights, etc.).

Cost of property must be entered in column 5 if a loss is claimed in column 9.

[317]

Plaintiff's Exhibit No. 26—(Continued)

SCHEDULE C—COMPENSATION OF OFFICERS
(See Instruction 15)

1. Name and Address of Officer	2. Official Title	3. Time Devoted to Business	Shares of Stock Owned 4. Common	5. Preferred	6. Amount of Compensation (Enter as Item 15)
.....
.....
.....
.....

Note: Schedule C-1 in Duplicate also must be filed with this return if compensation in excess of \$15,000 was paid to any officer or employee.

Plaintiff's Exhibit No. 26—(Continued)

SCHEDULE D—COST OF REPAIRS

(See Instruction 17)

1. Items	2. Amount (Enter as Item 17)
Salaries and wages.....	\$.....
Other costs
.....

SCHEDULE E—TAXES PAID

(See Instruction 19)

1. Items	2. Amount (Enter as Item 19)
.....	\$.....
.....
.....

SCHEDULE F—EXPLANATION OF DEDUCTION FOR
LOSSES BY FIRE, STORM, ETC.

(See Instruction 20)

1. Kind of Property	2. Date Acquired	3. Cost	4. Subsequent Improvements
.....	\$.....	\$.....
.....
.....

5. Depreciation Allowable Since Acquisition	6. Insurance and Salvage Value	7. Deductible Loss (Enter as Item 20)
\$.....	\$.....	\$.....
.....
.....

State how property was acquired.....

[318]

SCHEDULE G—BAD DEBTS

(See Instruction 21)

1. Year	2. Net Income	3. Sales on Account	4. Bad Debts
1931	\$.....	\$.....	\$.....
1932

Plaintiff's Exhibit No. 26—(Continued)

1933	-----	-----	-----
1934	-----	-----	-----
1935	-----	-----	-----

SCHEDULE H—INCOME FROM DIVIDENDS

(See Instruction 12)

Itemize below all dividends received during the year, stating the amount and the name and address of the corporation which declared the dividends.

SCHEDULE I—EXPLANATION OF DEDUCTION
FOR DEPRECIATION

(See Instruction 23)

1. Kind of Property (If buildings, state material of which constructed)	2. Date Acquired	3. Cost or March 1, 1913 Value if Acquired Prior to That Date (Indicate basis)
-----	-----	\$-----
-----	-----	-----
-----	-----	-----
-----	-----	-----
-----	-----	-----
-----	-----	-----
4. Assets Fully Depreciated in Use at End of Year	5. Depreciation Al- lowed (or Allowable) in Prior Years	6. Remaining Cost or Other Basis to Be Recovered
\$-----	\$-----	\$-----
-----	-----	-----
-----	-----	-----
-----	-----	-----
-----	-----	-----

Plaintiff's Exhibit No. 26—(Continued)

7. Life Used in Accumulating Depreciation	8. Estimated Re- maining Life From Beginning of Year	9. Depreciation Allowable This Year
-----	-----	\$-----
-----	-----	-----
-----	-----	-----
-----	-----	-----
-----	-----	-----

[319]

AFFIDAVIT (See Instruction 46)

We, the undersigned, president (or vice president, or other principal officer) and treasurer (or assistant treasurer, or chief accounting officer) of the corporation for which this return is made, being severally duly sworn, each for himself deposes and says that this return (including its accompanying schedules and statements, if any) has been examined by him and is, to the best of his knowledge and belief, a true, correct, and complete return, made in good faith, for the taxable year stated, pursuant to the Revenue Act of 1934 and the Regulations issued thereunder.

[Corporate Seal]

JOE E. CLIFT

Liquidating Agent

Sworn to and subscribed before me this 13th day of March, 1936.

[Notarial Seal]

E. J. LEMKE

Notary Public

AFFIDAVIT (See Instruction 47)

I/we swear (or affirm) that I/we prepared this return for the person named herein and that the return (including its accompanying schedules and statements, if any) is a true, correct, and complete statement of all the information respecting the income tax and/or excess-profits tax liability of the person for whom this return has been prepared of which I/we have any knowledge.

(Signature of person preparing the return)-----
(Signature of person preparing the return)-----
(Name of firm or employer, if any)

Plaintiff's Exhibit No. 26—(Continued)

Sworn to and subscribed before me this day of
....., 193.....

[Notarial Seal]

.....
(Signature of officer administering oath)

.....
(Title)

A-4

[320]

YAKIMA FIRST NATIONAL BANK

Yakima, Washington

TAX RETURN

1 9 3 5

A-5

[321]

YAKIMA FIRST NATIONAL BANK

Yakima, Washington

Year ending December 31st, 1935

RECEIPTS

Interest

Loans and Discounts.....	\$114,575.31
U. S. Bonds.....	16,194.47
Bonds—Non-taxable	22,450.20
Bonds—Taxable	9,163.57
Warrants	2,567.23
Other Securities	3,470.21

Other Sources

Federal Reserve Bank Dividend.....	1,021.94
Exchange—Out of town checks.....	79.88
Exchange—Collection Department	5,962.42
Rent—Night Depositary	113.25
Notary Fees	168.75
Service Charges (N. S. F.).....	620.50
Service Charges (Commercial Accts.).....	7,686.30
Service Charges (Notes).....	159.50
Trust Department Fees.....	10,488.75
Profit—Sale of Sunshine Mining Co. Stock.....	77,773.95
Interest Bank balances.....	16.64
Rent—Safe Deposit Boxes.....	2,049.50
Dividend—1500 shares Sunshine Mining Co.....	1,050.00

Plaintiff's Exhibit No. 26—(Continued)

Marine Bancorporation—Purchase of Deposits

Yakima First National Bank, Yakima, Wn.....	200,000.00
Profit on Bonds sold—Schedule follows.....	69,778.44
Recoveries—Schedule follows	530.24
Old Drafts and Cashier's Checks Outstanding....	211.52
Over and Short Account.....	202.59
	<hr/>
	\$546,335.16

A-6

[322]

FROM RECEIPTS

Interest, Loans and Discounts.....	\$114,575.31
Bank Balances	16.64
Other Securities	3,470.21
Bonds—Taxable	9,163.57

Entered Line 7 \$127,225.73

Exchange—Out of town checks.....	79.88
Exchange—Collection Department	5,962.42
Notary Fees	168.75
Service Charges (N. S. F.).....	620.50
Service Charges (Commercial Accts.).....	7,686.30
Service Charges (Notes)	159.50

Entered Line 9 \$ 14,677.35

Recoveries	530.24
Drafts and Cashier's Checks outstanding.....	211.52
Over and Short Account.....	202.59
Trust Fees	10,488.75

Entered Line 13 \$ 11,433.10

Rents:

Safe Deposit Boxes.....	2,049.50
Nigh Depository	113.25

Entered Line 8 \$ 2,162.75

Plaintiff's Exhibit No. 26—(Continued)

Miscellaneous:

Marine Bancorporation (National Bank of Commerce for deposit Yakima First National Bank)	200,000.00
Profit on Sunshine Mining Co. Stock Sold.....	77,773.95

 \$277,773.95

A-7

[323]

SCHEDULE OF PROFIT ON BONDS SOLD

\$ 5,000	Interborough Rapid Transit, 5%, 1966..	\$ 1,123.00
49,000	Yakima Special Water, 5%, 1946-47-51..	4,410.00
10,000	Big 7 Warehouses, 7%.....	4,890.54
35,000	Yakima Special Water, 5%, 1944-45.....	3,150.00
18,000	City of Yakima Walnut Street Crossing 4¼%, 1954-56	900.00
500	Fed. Farm Mtge. Corp. 3%, 1944-49.....	11.55
2,500	Yakima Fruit & Cold Stge. 6%, 1936.....	75.00
175	H.O.L. Corp. 3% 1952.....	3.05
9,000	Naches-Selah Irrig. Dist. 6%, 1938.....	1,350.00
10,000	City of Seattle Water, 4½%, 1939.....	150.00
5,000	Everett General Water, 5%, 1936.....	50.00
7,000	Republic of Finland, 5½%, 1958.....	1,811.25
100,000	U. S. Treas. 3¾%, 1941-43	3,687.50
40,000	U. S. Treas. 3¾%, 1940-43	1,678.14
40,000	U. S. Treas. 3¼%, 1937.....	2,237.50
70,000	U. S. Treas. 3¾%, 1943-47	1,750.00
165,000	U. S. Treas. 3¾%, 1943-47.....	4,125.00
100,000	U. S. Treas. 3¾%, 1940-43.....	3,500.00
35,000	U. S. Treas. 3½%, 1946-49.....	1,181.25
200,000	U. S. Treas. 3¼%, 1943-45.....	875.00
100,000	U. S. Treas. 2½%, 1939.....	531.25
40,000	U. S. Treas. 3%, 1946-48	875.00
118,000	U. S. Treas. 2½%, 1939.....	2,175.63
25,000	Philippine Pub. Impr. 4%, 1935.....	851.70
500,000	U. S. Consols, 2%, 1930.....	1,894.67
10,000	Alleghany Corp. 5%, 1944.....	59.60
10,000	Associated Telephone Utilities, 5½% '44	396.00
15,000	Yakima Special Water, 5%, 1948-49.....	1,575.00
18,000	Yakima Special Water, 5%, 1949-50.....	1,890.00

Plaintiff's Exhibit No. 26—(Continued)

Schedule of Profit on Bonds Sold—(Continued)

10,000	Richfield Oil Co. 6%, 1944.....	195.20
12,000	Yakima Special Water, 5%, 1950-51	1,260.00
10,000	Canadian National Ry. 5%, 1969.....	1,025.00
10,000	Chesapeake Corp. 5%, 1947.....	483.50
5,000	Pacific Gas & Electric 4½%, 1960.....	441.75
10,000	Remington-Rand, Inc. 5½%, 1947.....	1,083.50
2,000	Yakima Special Water, 5%, 1946.....	205.00
10,000	City of Helsingfors, Finland, 6½%, 1960	2,028.12
30,000	Philippine Pub. Impr. 4%, 1936.....	1,054.55
16,000	Federal Land Bank, 4¼%, 1937-57.....	1,760.00
10,000	Texas Corporation, 5%, 1944.....	237.50
22,600	U. S. Fourth L. L. 4¼%, 1933-38.....	733.90
2,700	U. S. Treas. 3⅜%, 1940-43.....	116.44
6,400	U. S. Treas. 3¼%, 1943-45.....	40.00
10,000	U. S. Treas. 3%, 1946-48.....	184.38
4,450	U. S. Treas. 2⅞%, 1955-60.....	182.67
1,000	U. S. Treas. 2⅞%, 1955-60.....	33.12
5,700	U. S. Treas. 2¾%, 1936.....	178.13
100,000	U. S. Treas. 2⅛%, 1939.....	843.75
200,000	U. S. Treas. 2⅛%, 1939.....	2,187.50
4,450	U. S. Treas. 2½%, 1938.....	11.02
100,000	U. S. Treas. 2½%, 1938.....	906.25
100,000	U. S. Treas. 2½%, 1938.....	875.00
	A-8	
	[324]	
118,000	U. S. Treas. 1⅛%, 1936.....	885.00
80,000	U. S. Treas. 1⅜%, 1939.....	200.00 -
6,100	Federal Farm Mtge. Corp. 3%, 1944-49..	163.94
7,300	Federal Farm Mtge. Corp. 3%, 1944-49..	13.69
10,600	Federal Farm Mtge. Corp. 3%, 1942-47..	39.75
775	H. O. Loan Corp. 2¾%, 1948.....	7.27 -
3,000	Sunnyside G. O. Sewer, 5½%, 36-38.....	90.50
78,000	Yakima Co. Roads of 1925-1926, 4½%....	3,231.00
10,000	Yaikma Genl. Water, 4½%, 1942.....	817.00
11,000	Yakima Genl. Water, 4½%, 1944.....	982.80
12,000	Yakima Special Water, 5%, 1936-40....	741.00
84,000	Yakima Sewer, 5¼%, 1939.....	4,342.80
10,000	City of Sedro Woolley, 5%, 1936.....	179.00
11,500	Yakima School Dist. #26, 4½%, 1947....	115.00

Plaintiff's Exhibit No. 26—(Continued)

Schedule of Profit on Bonds Sold—(Continued)

7,000	Yakima Genl. Coupon Water, 4½%, 1936	182.90
25,000	Port of Grays Harbor, 6%, 1941.....	167.50
19,000	City of Spokane Genls, 4%, 1947.....	698.44
5,000	Aberdeen School Dist. #5, 4½%, 1937..	50.00
10,000	City of Salem, Ore. 3¼%, 1940-41.....	52.50 -
12,000	State of Washington, Capitol Bldg. 4½%, 1947	390.00 -
10,000	Tacoma Lt. & Pwr. 4¾% 1942.....	59.45
1,000	Aberdeen School Dist. #5, 4¾%, 1940	2.70 -
1,000	Aberdeen School Dist. #5, 4¾%, 1941	2.30 -
4,000	Aberdeen School Dist. #5, 4½%, 1936..	19.69 -
		<hr/>
		\$69,778.44

Schedule of Recoveries

Oregon Packing Company Check.....	\$ 5.00
Second Liberty Loan coupon.....	9.56
S. J. Narboe Note.....	250.00
W. T. Elmore Note.....	50.00
A. D. McAulay note.....	42.60
Furnace sold American Legion, Ellensburg.....	100.00
Vines Trading Co. note.....	24.48
Old adding machine sold.....	10.00
Correction—Loans & Discounts.....	1.00
Oregon Packing Company check.....	4.00
Ira Cleveland note.....	14.60
W. G. Bell note.....	19.00
	<hr/>
	\$ 530.24

A-9

[325]

Yakima First National Bank
Yakima, Washington

DISBURSEMENTS

Advertising	\$ 407.02
Bond Premium (Employees Blanket Bond).....	174.39
Freight and Express.....	117.76

Plaintiff's Exhibit No. 26—(Continued)

Insurance (Burglary)	1,347.11
Attorney's Fees	1,463.84
Postage	1,775.23
Stationery and Printing.....	4,340.84
Subscriptions and Dues.....	1,245.81
Directors' Fees and Examinations.....	1,366.72
Telephone and Telegraph.....	860.85
Repairs & Upkeep (Typewriters & Adding Machines)	1,121.01
Repairs & Upkeep (Maintenance—Banking House)	357.13
Fire Insurance	271.82
Heat, Light and Water.....	621.69
Janitor's Salary	887.50
Janitor's Supplies	248.74
Traveling Expenses	267.21
Lunches	81.62

 \$16,956.29

A-10

[326]

Yakima First National Bank

Yakima, Washington

DISBURSEMENTS

Forward—

Donations:

Community Chest	\$ 437.50
-----------------------	-----------

Taxes:

Real Estate—Banking House.....	\$ 3,313.50
Duty on circulation	579.36
Redemption of National Bank Notes	480.07
State Tax	559.87
Capital Stock Tax	458.00
	\$ 5,390.80

Compensation of Officers

R. M. Hardy, President.....	6,375.00
C. R. Donovan, Vice President..	2,868.75
Joe L. Clift, Vice President.....	2,868.75
L. R. Rightmire, Vice President	2,868.75
H. F. Crawford, Cashier.....	2,295.00

Plaintiff's Exhibit No. 26—(Continued)

E. P. Hoffman, Assistant Vice President	2,125.00	
E. J. Lemke, Assistant Cashier....	1,700.00	
F. V. Glaetzner, Assistant Cashier	1,700.00	
	<hr/>	\$ 22,801.25
Salaries and Wages		\$ 29,409.00

A-11

[327]

Yakima First National Bank
Yakima, Washington

DISBURSEMENTS

Forward—

Depreciation Bank Building, 1932-1933	\$ 18,897.20	
Depreciation Bank Building, 1934....	9,748.60	
Depreciation Furniture and Fixtures, 1933	1,462.24	
Depreciation Furniture and Fixtures, 1934	1,297.29	
	<hr/>	\$ 31,405.33
Losses on Bonds sold, Schedule Follows.....	\$ 49,037.81	
First Security & Loan Corporation Bonds Written Off	\$ 55,215.00	
Losses on Loans written off, Schedule follows.....	\$227,142.74	
Losses on Forgeries, Schedule follows.....	\$ 63.30	
Dividend to Yakima Holding Corporation.....	\$ 19,262.65	
Interest Paid:		
Time C. D.'s	\$ 1,498.53	
Savings Department	43,610.73	
Yakima County Funds	2,610.84	
City of Yakima	374.33	
Washington Mutual Savings Bank	850.83	
Special Deposits (State Banking Dept.)	18.11	
Postal Savings	63.94	
Benton County	53.66	\$ 49,080.97

Plaintiff's Exhibit No. 26—(Continued)

Total Undivided Profits	\$ 40,132.52
	<hr/>
	\$546,335.16
	<hr/>

A-12

[328]

SCHEDULE OF LOSSES ON BONDS SOLD

\$ 1,000	Missouri Pacific 5%, 1977.....	\$ 34.16
1,000	Missouri Pacific 4%, 1975.....	25.41
5,000	New Orleans, Texas & Mexico, 5%, 1935	348.27
5,000	New Orleans, Texas & Mexico, 5%, 1935	342.02
10,000	Denver & Rio Grande Ry. 4%, 1936.....	7,196.56
10,000	Southern Ry. 5%, 1994.....	1,809.18
1,000	Buff. Roch. & Pitts. Ry. 4½%, 1957.....	214.48
10,000	Erie Railway, 4%, 1996.....	221.65
5,000	Missouri Pacific, 5%, 1977.....	160.78
10,000	Baltimore & Ohio 5%, 2000.....	4,034.00
10,000	Erie Railway, 5%, 1975.....	1,034.00
10,000	Great Northern Ry. 4½%, 1976.....	2,809.00
1,000	Buff. Roch. & Pitts. 4½%, 1957.....	211.98
9,000	Chicago & N. W. Ry. 4½%, 2037.....	5,419.39
1,000	Chicago & N. W. Ry. 4½%, 2037.....	600.91
4,000	Missouri Pacific 5%, 1977.....	128.62
4,000	Missouri Pacific 5%, 1977.....	129.07
6,000	Missouri Pacific 5%, 1977.....	192.93
7,000	Buff. Roch. & Pitts. 4½%, 1957.....	1,522.10
1,000	Buff. Roch. & Pitts. 4½%, 1957.....	217.43
10,000	Richfield Oil Company 6%, 1944.....	3,109.86
10,000	Florida East Coast 5%, 1974.....	34.48
10,000	Seaboard Air Line 4% 1959.....	304.00
10,000	Rhine Westphalia Elec. 6%, 1955.....	204.00
6,000	St. Louis & San Francisco, 4%, 1950....	332.40
10,000	N. Y. Central & Hudson River, 4½%, 2013	4,489.40
2,000	St. Louis & San Francisco, 4%, 1950.....	120.80
2,000	St. Louis & San Francisco, 4%, 1950.....	60.40
10,000	Inter. Tel. & Tel. 5%, 1955.....	375.00
10,000	American & Foreign Power, 5%, 2030....	350.00
10,000	Cities Service Gold Deb. 5%, 1950.....	2,009.37
10,000	Cities Service Power & Light 5½%, 1952	2,525.00

Plaintiff's Exhibit No. 26—(Continued)

10,000	So. Calif. Edison Co. 3¾%, 1960.....	50.00
	Yakima & Benton Co. Bonds.....	63.16
2,300	First L. L. 3½%, 1947.....	15.10
2,700	First L. L. 4¼%.....	43.03
250	First L. L. 4¼%.....	7.64
	First Security & Loan Corp. bonds.....	55,215.00
10,000	Atchison, Topeka & Santa Fe, 4½%, 1948	1,179.00
10,000	Minn. St. Paul & S S Marie, 4%, 1938	6,159.06
10,000	Alleghany Corp. 5%, 1950.....	879.00
5,000	Edison Electric Co. 3%, 1937.....	75.17

\$104,252.81

A-13

[329]

SCHEDULE OF LOSSES ON FORGERIES

P. E. Wise.....	\$	16.50
N. G. Nelson (no account).....		2.50
U. S. Treasury check forged.....		41.30
Harry Anderson		3.00

\$ 63.30

A-14

[330]

SCHEDULE OF LOSSES ON LOANS WRITTEN OFF

Yakima Fruit & Cold Storage Company (judg- ment)	\$	5,191.04
J. R. Schwartz		2,000.00
Harry Coonse		200.00
F. M. Balcom Compan ^t		4,581.83
M. M. Burge.....		5,000.00
Ira Cleveland		3,614.60
Robert Hamilton		5,000.00
L. H. Kuhn		5,000.00
Wikstrom—Chas, Inc.		4,000.00
Yakima Milling Company		9,900.00
Yakima Mortgage & Bond Company.....		3,170.12
Cornelia Appy		138.00

Plaintiff's Exhibit No. 26—(Continued)

J. R. Brubaker	50.00
Lena A. Buell	240.00
Mrs. Ira D. Cardiff.....	445.00
L. M. & Martha P. Clark.....	55.00
C. M. & Emma L. Cunningham & John Dankers....	611.84
L. H. Kuhn.....	224.31
Leo J. Mahre.....	540.00
W. C. McLaughlin	25.00
Service Grocery Company.....	99.00
Ed Smith	190.00
W. A. & Anna Wilson.....	147.60
Ernest F. Berg.....	9,000.00
C. P. Cahoon.....	3,000.00
Dexter Cahoon	1,850.00
Harry Coonse	2,525.88
J. J. Crawford	5,000.00
L. A. Dash.....	2,840.00
James H. Fraser.....	5,000.00
Mazie P. Grinnell.....	5,000.00
E. E. Samson Co., Inc.....	9,000.00
Woolgrowers Service Corp.	37,000.00
Wapato Fruit & Cold Storage Co.....	10,521.47
F. M. Balcom Company.....	25,726.17
L. E. & I. J. Bounds.....	3,748.40
W. H. Doescher	725.00
L. H. Kuhn	10,000.00
John J. McDonald.....	5,900.00
J. J. McDonald.....	787.75
C. A. & Bessie Marsh.....	17,500.00
F. G. Monroe.....	300.00
W. P. Ridgway.....	44.73
Logan H. Roberts.....	15,000.00
Albert E. Wetzel.....	3,000.00
Henry Wetzel	3,250.00

 \$227,142.74

A-15

[331]

Plaintiff's Exhibit No. 26—(Continued)

Yakima First National Bank

Yakima, Washington

Depreciation Bank Building—8½ months to date September 15, 1935, of Merger or Sale.....\$	6,692.73
Depreciation of Furniture Fixtures to date, Sep- tember 15, 1935, of Sale.....\$	796.87
	A-16

[332]

Yakima First National Bank

Yakima, Washington

DEPRECIATION TAKEN ON BONDS WRITTEN DOWN
1930-1931—NOT ALLOWED. SOLD 1935.

Bonds Sold		Maturity		Amount
Republic of Finland.....	5½%	1958	1930-31	\$ 1,812.50
City of Helsingfors.....	6½%	1960	1931	1,203.12
Associated Telephone Utili- ties	5½%	1944	1930-31	1,937.50
Erie R. R.	4%	1996	1930	780.00
Southern R. R.....	5%	1994	1930	75.00
Alleghany Corporation	5%	1944	1930-31	3,801.25
Erie R. R.	5%	1975	1930-31	2,500.00
Missouri Pacific R. R.....	5%	1977	1930-31	550.00
Buffalo, Rochester and Pittsburg R. R.....	4½%	1957	1930-31	1,396.88
Chicago & N. W. R. R.....	4½%	2037	1930-31	1,650.00
Remington Rand Inc.....	5½%	1947	1930	500.00
Rhine Westphalia Electric Power	6%	1955	1930-31	2,362.50
Chesapeake Corporation....	5%	1947	1930	192.50
Minneapolis, St. Paul & S. S. Marie	4%	1938	1930	330.00
St. Louis, San Francisco Ry. Co. Prior Lien Se- ries A	4%	1950	1930	125.00
Alleghany Corporation	5%	1950	1930-31	3,200.00
International Telephone and Telegraph	5%	1955	1930-31	2,000.00
Cities Service Co.....	5%	1950	1930-31	2,465.63
American Foreign Power..	5%	2030	1930-31	1,550.00

Plaintiff's Exhibit No. 26—(Continued)

Bonds Sold	Maturity			Amount
Cities Service Power &				
Light Co.	5½%	1952	1930-31	1,230.00
Yakima Special Water				
Bonds	5%	Various	1930	1,678.00
				<hr/>
				\$31,339.88

A-17

[333]

In April 1925 the Yakima National Bank took over the deposits of the Yakima Trust Company. In a contract dated April 3, 1925 it was specified that a commission of \$26,947.00 was to be paid by the Yakima National Bank to the Yakima Trust Company. The commission \$26,947.00 paid by the Yakima National Bank, was not allowed as a deduction as shown by Revenue agent's audit dated March 17, 1928 years covered 1925-1926.

The First National Bank, Yakima, Washington merged with the Yakima National Bank February, 1930 under title Yakima First National Bank, which bank's deposits were subsequently taken over in 1935 by the National Bank of Commerce of Seattle, Washington, now operating as their Yakima Branch.

We are claiming as a deduction 3% of the deposits of the First National Bank (\$1,832,051.29) \$54,961.53, also 3% deposits of Yakima National Bank (\$983,401.18) \$29,502.03 as of March 1, 1913. Total including as above *state* \$26,947.00 in the amount of \$111,410.56.

A-18

[334]

Plaintiff's Exhibit No. 26—(Continued)

DEPRECIATION SCHEDULE
BUILDING
 Compiled for Income Tax Purpose

Kind of Property	Date Acquired	Cost	Life	Per Cent	1935	Previous Yrs.
Rubber tile	1931	988.50	10 yrs	10	98.85	329.50
Light Fixtures	1931	2,117.25	20	5	105.86	352.87
Electric Fixtures	1931	1,007.10	20	5	50.36	167.86
Burglar Alarm	1931	2,250.00	10	10	225.00	750.00
Bronze Counters	1931	1,806.00	20	5	90.30	301.00
Counters	1931	5,260.00	20	5	263.00	876.66
Elevator Building	1931	3,000.00		12	360.00	1,440.00
Plumbing Building	1931	5,000.00		12	600.00	2,400.00
Marbel Building	1931	10,000.00	10	10	1,000.00	4,000.00
Bldg. Proper	1931	85,846.78		3	2,575.40	10,301.60
Bldg. Additions	1931	59,913.86		3	1,797.42	5,991.40
Plumbing & Heating	1931	23,045.65		7	1,613.20	5,377.33
Electric Fixtures	1931	3,637.20	20	5	181.86	606.20
Marble in Bldg	1931	9,747.00	20	5	487.35	1,624.50
		<u>\$213,619.34</u>			<u>\$ 9,448.60</u>	<u>\$34,518.92</u>

Depreciation taken for 8½ months to September 15, 1935, date taken over by The National

Bank of Commerce of Seattle, Seattle, Washington\$ 6,692.73
 A-19

[335]

Plaintiff's Exhibit No. 26—(Continued)

Depreciation for 8½ months \$796.87

DEPRECIATION SCHEDULE
FURNITURE AND FIXTURES
Compiled for Income Tax Purposes

Kind of Property	Date Acquired	Fair Value & Cost	Life	Per Cent	1935	Previous Yrs.
Fixtures	1921	(3,654.60)	10 yrs	10		
"	1922	(2,185.79)	10	10		
"	1923	(1,484.16)	10	10		
"	1924	(1,504.53)	10	10		
"	1925	1,216.00	10	10	36.00	1,180.00
"	1926	197.13	10	10	19.71	157.68
"	1927	252.00	10	10	25.20	176.40
"	1928	2,763.20	10	10	276.32	1,794.10
"	1929	132.15	10	10	13.22	66.07
"	1922	(93.84)	10	10		
"	1924	(62.50)	10	10		
"	1925	1,024.70	10	10	102.47	1,001.25
"	1925	(85.00)	10	10		
Deposit Boxes	1921	9,468.30	40	2½	236.71	3,313.90
Deposit Boxes	1925	6,302.00	40	2½	157.55	1,536.24
Misc. Replacements	1922	(114.39)	10	10		
Adding Machine	1926	(899.00)	5	20		

Plaintiff's Exhibit No. 26—(Continued)

Depreciation Schedule—(Continued)
Furniture and Fixtures—(Continued)

Kind of Property	Date Acquired	Cost	Life	Per Cent	1935	Previous Yrs.
Adding Machine	1927	(966.72)	5	20		
Typewriter	1926	(181.50)	5	20		
Typewriters	1927	(335.00)	5	20		
Cancelling Machine	1927	374.85	10	10	37.40	299.92
Remittance Machine	1927	(828.00)	5	20		
Money Wrapper	1927	325.00	10	10	32.50	260.00
Misc. Equipment	1927	289.90	10	10	28.99	217.43
Typewriter	1927	(111.17)	5	20		
Checkwriter	1928	(96.25)	5	20		
Vault Doors	1928	3,600.00	50	2	72.00	1,800.00
Furniture	1931	320.50	10	10	32.05	106.83
Furniture	1931	358.50	10	10	35.85	128.47
Rugs	1931	189.40	10	10	18.94	63.15
		<u>\$ 26,813.63</u>			<u>\$ 1,125.00</u>	<u>12,101.44</u>
					†1,124.91	

†Pen and ink notation.

A-20
[336]

Plaintiff's Exhibit No. 26—(Continued)

Yakima First National Bank

Yakima, Washington

COMPARATIVE STATEMENT

Assets:		
	December 31, 1935	December 31, 1934
Loans and Discounts.....	\$ 335,626.96	\$3,037,186.47
Overdrafts		816.85
U. S. Bonds for Circulation.....		500,751.57
U. S. Securities.....		1,527,498.22
Other Bonds on Hand.....	278,982.18	1,221,760.81
City and County Warrants.....	242.80	63,931.55
Federal Reserve Bank Stock.....		18,000.00
Federal Reserve Deferred Credit Account		19,012.05
Federal Reserve Bank		813,139.08
Cash		600,379.74
Five Per Cent Redemption Fund		25,000.00
Drafts in Transit.....		46,618.14
Federal Deposit Insurance.....	12,121.42	12,121.42
Bank Premises—Buildings		192,986.53
Bank Premises—Land		50,000.00
Bank Furniture and Fixtures....		60,054.35
Due from Banks.....	91,963.69	1,579,507.12
Yakima N. B. C. Adjustment Ac- count	3,391.01	.....
	<hr/>	<hr/>
	\$ 722,328.06	\$9,768,763.90
Liabilities:		
Deposits	\$	\$8,588,121.64
Circulation		500,000.00
Capital Stock	500,000.00	500,000.00
Surplus	100,000.00	100,000.00
Undivided Profits	120,774.78	80,642.26
Reserve Account .....	.....	.....
Dividends Unpaid	1,553.28	.....
	<hr/>	<hr/>
	\$ 722,328.06	\$9,768,763.90

PLAINTIFF'S EXHIBIT No. 28

United States of America

Treasury Department

Washington

August 2, 1941

Pursuant to the provisions of Section 661, Chapter 17, Title 28 of the United States Code (Section 882 of the Revised Statutes of the United States), I hereby certify that the annexed is a true copy of Corporation Income and Excess-Profits Tax Return for 1935, (with schedules attached), filed by Yakima Holding Corporation, Yakima, Washington, on file in this Department.

In Witness Whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury:

[Seal]

F. A. BIRGFELD

F. A. Birgfeld

Chief Clerk,

Treasury Department. [338]

Plaintiff's Exhibit No. 28—(Continued)

Form 1120	Return Form Marked "Duplicate" Must Be Filed With This Original Return	Page 1 of Return
Treasury Department	CORPORATION INCOME AND EXCESS- PROFITS TAX RETURN FOR CALENDAR YEAR 1935	File Code—805 Serial Number—856760
Internal Revenue Service	or Fiscal Year begun....., 1935, and ended....., 1936	
(Auditor's Stamp)	Print Plainly Corporation's Name and Business Address Yakima Holding Corporation Box 397 Yakima, Washington	District—Washington (Cashier's Stamp)
E—Survey Review	It is Essential, Except Where Otherwise Provided in the Instructions, That This Form Be Completely Filled In Irrespective of Any Statements, Schedules, or Reports Submitted Herewith.	Cash Check M.O. Cert. of Ind
Aug 22 1940		
By: R. Lancaster	Date of Incorporation—January 17, 1930	First Payment
	Under the Laws of What State or Country— State of Washington	\$ Reed Wash B1

The Corporation's Books are in Care of Taxpayer. Located at..... Kind of business (in detail)—
Holding Corporation. Is This a Consolidated Return of Railroad Corporations?—No. If so, of How

Plaintiff's Exhibit No. 28—(Continued)

Many Corporation?..... If a Foreign Corporation, State Whether Resident or Nonresident.....; if Nonresident State Amount of Income Excluded (Instruction 33) From Gross Income, \$..... Is the Corporation a Personal Holding Company Within the Meaning of Section 351 of the Revenue Act of 1934? (Answer "yes" or "no")—No. (If so, an additional return on Form H must be filed.)

[339]

GROSS INCOME

Item and
Instruction No.

1. Gross Sales (where inventories are an income-determining factor), \$.....; Less returns and Allowances, \$..... Net Sales \$.....\$.....
2. Less Cost of Goods Sold:
 - (a) Inventory at beginning of year \$.....
 - (b) Material or merchandise bought for manufacture or sale.....
 - (c) Miscellaneous costs (From Schedule A, Column 1):
 - (1) Salaries and wages, \$.....; (2) Other costs, \$.....; Total.....
 - (d) Total of lines (a), (b), and (c) \$.....
 - (e) Less inventory at end of year.....
3. Gross Profit from Sales (Item 1 minus Item 2).....\$.....
4. Gross Receipts (where inventories are not an income-determining factor) \$....
5. Less cost of operations (From Schedule A, Column 2):
 - (a) Salaries and wages, \$.....; (b) Other costs, \$.....; Total.....
6. Gross Profit where inventories are not an income-determining factor (Item 4 minus Item 5).....

Plaintiff's Exhibit No. 28—(Continued)

7. Interest on Loans, Notes, Mortgages, Bonds, Bank Deposits, etc.	.....
8. Rents	.....
9. Royalties	.....
10. Capital Gain or Loss (From Schedule B)	.....
11. Interest on Liberty Bonds, etc. (From Schedule L, Lines 2(a) (6) and (7))	.....
12. Dividends on Stock of	.....
(a) Domestic Corporations subject to taxation under Title I of Revenue Act of 1934	.....
(b) Domestic Corporations not subject to taxation under Title I of Revenue Act of 1934	.....
(c) Foreign Corporations	.....
13. Other Income (State nature of income) (Use separate schedule, if necessary)	.....
14. Total Income in Items 3, and 6 to 13, Inclusive	.....	\$ 27,929.75

[Stamped] : Claim Rejected.

[Printer's Note] : In right-hand margin figures 12, 50, 96, 6 written in ink.

Special Adjustment Section		Sec. 272C Rev. Act 1934
Income Tax	.....	\$13,037.55
Penalty 50%	.....	6,518.78
Interest	.....	1,705.60
Excess Profits Tax	.....	3,477.96
Penalty 50%	.....	1,738.98

	Basis	624.37
	Audited by (Illegible)	
	Unit No. 3	Date 1938

Plaintiff's Exhibit No. 28—(Continued)

[340]

List—May 20 1938 #3
Page 0 Line 5

Interest	454.99
<hr/>	
Total	\$26,933.86
Parent Co.....	.....

DEDUCTIONS

- | | |
|--|---------|
| 15. Compensation of Officers (From Schedule C)..... | \$..... |
| 16. Rent on Business Property..... | ..... |
| 17. Repairs (From Schedule D) : (a) Salaries and Wages, \$.....; (b) Other Costs, \$..... Total..... | ..... |
| 18. Interest ..... | ..... |
| 19. Taxes (From Schedule E)..... | ..... |
| 20. Losses by Fire, Storm, etc. (From Schedule F)..... | ..... |
| 21. Bad Debts (From Schedule G) ; also bonds determined to be worthless during taxable year (Explain on separate sheet)..... | ..... |
| 22. Dividend (Item 12 (a) above)..... | ..... |
| 23. Depreciation (resulting from exhaustion, wear and tear, or obsolescence) (From Schedule I)..... | ..... |

Plaintiff's Exhibit No. 28—(Continued)

24.	Depletion of Mines, Oil and Gas Wells, Timber, etc. (Submit schedule, see Instruction 24)	
25.	Other Deductions Authorized by Law (Explain below, or on separate sheet):	
	(a) Salaries and wages. (Not included in Items 2, 5, 15, or 17 above).....	
	(b) Stock determined to be worthless during the taxable year.....	
	(c)	
26.	Total Deductions in Items 15 to 25.....	\$955.42
27.	Net Income (Item 14 minus Item 26) Deficit as per attached statement [Endorsed]: Received Mar. 14, 1936. Roscoe L. Tipple, Deputy Collector of Internal Revenue.	[341]

COMPUTATION OF TAX

Income Tax		Excess-Profits Tax*	
28.	Net Income (Item 27, above) Deficit	955.42	35. Net Income for Excess-profits Tax
29.	Less Interest on Liberty Bonds, etc. (Item 11)		Computation (Item 27, above) Deficit..
			36. Less: 12½% of \$202075.34 adjusted declared value of capital stock as shown
			955.42

Plaintiff's Exhibit No. 28—(Continued)

30. Balance subject to Income Tax (Item 28 minus Item 29).....	\$.....
31. Income Tax ($13\frac{3}{4}\%$ of Item 30) (or $15\frac{3}{4}\%$ of Item 30, if this is a consolidated return of railroad cor- porations)	None
32. Less: Income Tax Paid at Source. (This credit can be al- lowed only to a nonres- ident foreign corpora- tion)	None
33. Income Tax Paid to a For- eign Country or U. S. Posses- sion by a Domestic Corpora- tion	None
34. Balance of Income Tax (Item 31 minus Item 32 or 33).....	None
35. Amount Subject to Excess-profits Tax (Item 35 minus Item 36).....	None
36. Excess-profits Tax (5% of Item 37)....	\$.....

Note.—Where an affiliated group of railroad cor-
porations makes a consolidated Income Tax return,
the common parent corporation and each subsidiary
which is liable for the making of an Excess-profits
Tax return must make a separate Excess-profits Tax
return. (See Instruction 30 and 44.)

*Corporations having an income-tax fiscal year
ending after June 30, 1936, shall use Form 1121 in
making Excess-profits Tax returns for such fiscal year.

B-1

[342]

Plaintiff's Exhibit No. 28—(Continued)

SCHEDULE K—Balance Sheets (See Instruction 42)

Items	Beginning of Taxable Year Amount	End of Taxable Year Amount	Total
Assets			
1. Cash:			
(a) Demand deposits, including checks.....	\$ 10,144.23	\$ 1,297.18	
(b) Time deposits, including certificates of de- posit .....	.....	.....
(c) All other cash.....	\$ 10,144.23	\$ 1,297.18	
2. Notes receivable .....	.....	.....	1,136.25
3. Accounts receivable	\$	\$	
(a) Less reserve for bad debts.....	.....	.....
4. Inventories:			
(a) Raw materials	\$	\$	
(b) Work in process.....	.....	.....
(c) Finished goods .....	.....	.....
(d) Supplies .....	.....	.....
.....	
.....	

Plaintiff's Exhibit No. 28—(Continued)

Schedule K—Balance Sheets (See Instruction 42)—(Continued)

Items

Beginning of Taxable Year
Amount

End of Taxable Year
Amount

Total

5. Investments (nontaxable):

(a) Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia, or United States possession..... \$

(b) Obligations issued under Federal Farm Loan Act, or under such Act as amended.....

(c) Liberty 3½% Bonds and other obligations of United States issued on or before September 1, 1917.....

(d) Treasury Notes, Treasury Bills, and Treasury Certificates of Indebtedness.....

(e) Liberty 4% and 4¼% Bonds, United States Savings Bonds, and Treasury Bonds.....

(f) Obligations of instrumentalities of the United States (other than obligations to be reported in line (b) above).....

[343]

Plaintiff's Exhibit No. 28—(Continued)

Schedule K—Balance Sheets (See Instruction 42)—(Continued)

Items	Beginning of Taxable Year Amount	Total	End of Taxable Year Amount	Total
6. Other investments;				
(a) Stocks of domestic corporations.....	\$1,327,144.00		\$1,272,031.25	
(b) Bonds of domestic corporations.....	.....		.....
(c) Stocks and bonds of foreign corporations....	.....		.....
(d) All other investments or loans.....		1,327,144.00		1,272,031.25
7. Deferred charges:				
(a) Prepaid insurance	\$		\$	
(b) Prepaid taxes .....	.....		.....
(c) All other .....	.....		.....
8. Capital assets:				
(a) Buildings	\$		\$	
(b) Machinery and equipment.....	.....		.....
(c) Furniture and fixtures.....	.....		.....
(d) Delivery equipment .....	.....		.....
(e) Other depreciable assets.....	.....		.....
(f) Total of Lines (a) to (e).....	\$		\$	
(g) Less reserves for depreciation.....	.....		.....

Plaintiff's Exhibit No. 28—(Continued)

Schedule K—Balance Sheets (See Instruction 42)—(Continued)

Items	Beginning of Taxable Year Amount	Total	End of Taxable Year Amount	Total
(h) Depletable assets .....	.....	\$ .....	.....	.....
(i) Less reserves for depletion.....	.....	.....	.....	.....
(j) Land .....	.....	.....	.....	.....
9. Patents .....	.....	.....	.....	.....
10. Good will .....	.....	.....	.....	.....
11. Other assets (describe fully) :				[344]
.....	\$ 69,000.00		\$ 74,000.00	
.....	
.....	.....	69,000.00	.....	74,000.00
12. Total Assets	\$1,408,433.23		\$1,348,464.68	
Liabilities				
13. Notes payable (less than 1 year).....				
14. Accounts payable	50,000.00		\$	
15. Bonds and notes (not secured by mortgage).....	.....		.....
16. Mortgages (including bonds and notes so se- cured) .....	.....		.....

Plaintiff's Exhibit No. 28—(Continued)

Schedule K—Balance Sheets (See Instruction 42)—(Continued)

Items	Beginning of Taxable Year Amount	Total	End of Taxable Year Amount	Total
17. Accrued expenses:				
(a) Interest	\$		\$	
(b) Taxes .....	.....		.....
(c) All other .....	.....		.....
18. Other liabilities (describe fully):				
Reserve for Stock Adjustments.....	\$	78,000.00	\$	
19. Capital stock:				
(a) Preferred stock (less stock in treasury).....	\$		\$	
(b) Common stock (less stock in treasury).....	.....	1,281,456.25	.....	1,328,141.25
20. Surplus	\$		\$	
21. Undivided profits	Deficit	1,023.02	.....	20,323.43
22. Total Liabilities	\$ 1,408,433.23			\$1,348,464.68
Remarks:				B-2

[345]

Plaintiff's Exhibit No. 28—(Continued)

Page 3 of Return

SCHEDULE L—RECONCILIATION OF NET INCOME
AND ANALYSIS OF CHANGES IN SURPLUS

1. Net income subject to taxation (Item 30, page 1 of return).....	Deficit	955.42
2. Nontaxable income:		
(a) Interest on:		
(1) Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia, or United States possession		
(2) Obligations issued under Federal Farm Loan Act, or under such Act as amended		
(3) Liberty 3½% Bonds and other obligations of United States issued on or before September 1, 1917.....		
(4) Treasury Notes, Treasury Bills, and Treasury Certificates of Indebtedness..		
(5) Liberty 4% and 4½% Bonds, United States Savings Bonds, and Treasury Bonds owned in the principal amount of \$5,000 and under.....		
(6) Liberty 4% and 4½% Bonds, United States Savings Bonds, and Treasury Bonds owned in the principal amount of over \$5,000.....		
(7) Obligations of instrumentalities of the United States (other than those to be reported in Line 2 (a) (2) above).....		
(b) Dividends deductible under Section 23 (p) of the Revenue Act of 1934.....		20,521.87
(c) Proceeds of life insurance policies paid upon the death of the insured.....		
(d) Other items of nontaxable income (to be detailed):		
(1)		
(2)		
3. Charges against reserve for bad debts, if Item 21, page 1 of return, is not an addition to a reserve		

Plaintiff's Exhibit No. 28—(Continued)

NATURE OF BUSINESS

1. Check the block to indicate the industrial division in which the corporation's main income-producing business falls:

Manufacturing

Food and kindred products:

- () Bakery and confectionery products.
- () Canned products—fish, fruit, vegetables, etc.
- () Mill products—bran, flour, feed.
- () Packing-house products—meats, lard; slaughtering.
- () Sugar-beet, cane, maple; molasses, etc.
- () Other food products—butter substitutes, cereals, coffee, spices, dairy products; ice, etc.
- () Beverages, soft drinks, mineral water.
- () Brewing and distilling—alcohol, liquors, beer, malt extract, wines.
- () Tobacco products.

Textiles:

- () Cotton goods—dress goods, etc.; napping, dyeing.
- () Woolen and worsted goods—dress goods, etc.; wool pulling, scouring.
- () Silk and rayon goods—dress goods, thrown silk, etc.; spinning, warping.
- () Carpets, floor coverings, tapestries, linoleum.
- () Other textiles—cord, felt, fur, linen, artificial leather, surgical textiles, etc.
- () Clothing—custom-made, factory-made, underwear, millinery, etc.
- () Knit goods—sweaters, hosiery, etc.
- () Leather boots, shoes, slippers, etc.
- () Other leather products—saddlery, harness, trunks; finishing, tanning.
- () Rubber tires and tubes.
- () Other rubber goods—boots, shoes, hose, artificial rubber.
- () Bone, celluloid and ivory products.
- () Sawmill and planing mill products.
- () Furniture (not metal).
- () Other wood products—carriages, wagons, baskets, etc.

Plaintiff's Exhibit No. 28—(Continued)

Manufacturing—(Continued)

- () Paper, pulp and products.
- () Printing, publishing, and allied industries.
- () Petroleum and other mineral oil refining and products.
- () Chemicals proper, acids, compounds, coal tar products, etc.
- () Allied chemical substances, drugs, oils, soaps, etc.
- () Paints, pigments, varnishes, etc.
- () Fertilizers.
- () Stone, clay, glass, and related products.

Metal products and processes:

- () Iron and steel—products of blast furnaces, rolling mills, foundries.
- () Locomotives and railroad equipment.
- () Motor vehicles, complete or parts.
- () Machinery—factory, used in producing food, leather, metal, paper, printing, rubber, stone, clay, glass, textile and wood products.
- () Machinery—agricultural and equipment.
- () Machinery—electrical and equipment.

[348]

- () Machinery—other, building, construction, gas and mining machinery and equipment.
- () Household equipment—metal furniture, refrigerators, sewing machines, etc.
- () Office equipment.
- () Metal building material and equipment.
- () Hardware, tools, etc.
- () Precious metal, products and processes.
- () Other metals, products and processes.

Miscellaneous manufacturing:

- () Radios, complete or parts.
- () Musical, professional, and scientific instruments; optical goods, small boats.
- () Airplanes, airships, seaplanes; parts.

Nonmanufacturing

Trade:

- () Wholesale.

Plaintiff's Exhibit No. 28—(Continued)

Nonmanufacturing—(Continued)

- () Retail.
- () Wholesale and retail.
- () Commission.
- () Other trade—repair service, garages, etc.

Finance:

- () Banks—national, State, private, savings; jointstock land banks.
- () Stock and bond brokers, investment bankers or brokers.
- () Real estate, realty holding, real estate agents.
- () Insurance companies (not agents).
- (x) Investment trusts, stock syndicates, stock holding companies.
- () Other finance—loan companies, building and loan associations; note, mortgage or pawn brokers; insurance agents.
- () Agriculture and related industries, including fishing, forestry, ice-harvesting; leasing such properties.
- () Mining and quarrying, including gas and oil wells; leasing such properties.
- () Construction—excavations, bridges, buildings, railroads, ships; equipping and installing systems.
- () Transportation—rail, water, serial, motor, etc.; leasing such facilities.
- () Storage — cold storage, grain elevators, warehouses, safe-deposit vaults, etc.
- () Public utilities—electric light or power, gas (artificial or natural) pipe lines, telegraph, telephone, radiom, water-works, heat supply, toll bridges, etc.; leasing such utilities.
- () Service—professional, business, amusement, domestic, and all other.

[349]

AFFILIATIONS WITH OTHER CORPORATIONS

(See Instruction 38)

2. Is this a consolidated return?—No. If so, procure from the collector of internal revenue for your district Form 851, Affiliations Schedule, which shall be filled in, sworn to, and filed as a part of this return.

Plaintiff's Exhibit No. 28—(Continued)

3. Was the income of this corporation included in a consolidated return for the prior year?—No. If so, give name of corporation which filed the consolidated return.....

Predecessor Business

4. Did the corporation file a return under the same name for the preceding taxable year?—Yes. Was the corporation in any way an outgrowth, result, continuation, or reorganization of a business or businesses in existence during this or any prior year since December 31, 1917?—No. If answer is "yes", give name and address of each predecessor business, and the date of the change in entity..... Upon such change were any asset values increased or decreased?..... If the answer is "yes", closing balance sheets of old business and opening balance sheets of new business must be furnished.

Basis of Return

5. Is this return made on the basis of cash receipts and disbursements?—Yes. If not, describe fully what other basis or method was used in computing net income.....

Valuation of Inventories

6. State whether the inventories at the beginning and end of the taxable year were valued at cost, or cost or market, whichever is lower. If other basis was used, describe fully, state why used and the date inventory was last reconciled with stock.....

PREPARATION OF RETURN (See Instruction 47)

7. Did any person or persons advise the corporation in respect of any question or matter affecting any item or schedule of this return, or assist or advise the corporation in the preparation of this return, or actually prepare this return for the corporation? (Answer "yes" or "no")—No. If so, give the name and address of such person or persons and state the nature and extent of the assistance or [350] advice received and the items and schedules in respect of which the assistance or advice was received; if this return was actually prepared by any person or persons other than the corporation, state the source of the information reported in this return and the manner in which it was furnished to or obtained by such person or persons.....

Plaintiff's Exhibit No. 28—(Continued)

Information Return

8. Did the corporation make a return of information on Forms 1096 and 1099 (see Instruction 53) for the calendar year 1935? (Answer "yes" or "no")—No.

List of Attached Schedules

9. Enter below a list of all schedules accompanying this return, giving for each a brief title and the schedule number. The name and address of the corporation should be placed on each separate schedule accompanying the return—Profit & Loss Statement. [351]

B-3

SCHEDULE A (See Instructions 2 and 5)

1. Cost of Sales (Where Inventories Are an Income-Determining Factor)

Items	Amount (Enter as Item 2(c))
Salaries and wages	\$.....
Other costs
.....

2. Cost of Operation (Where Inventories Are Not an Income-Determining Factor)

Items	Amount (Enter as Item 5)
Salaries and wages	\$.....
Other costs
.....

SCHEDULE B—CAPITAL GAINS AND LOSSES

(From Sales or Exchanges Only) (See Instruction 10)

1. Description of Property	2. Date Acquired Mo. Day Year	3. Date Sold Mo. Day Year
7500 Shares Sunshine Mining Co., Kellogg, Idaho	Aug. 1934	5-1-35
.....
.....
.....

Plaintiff's Exhibit No. 28—(Continued)

4. Gross Sales Price (Contract price)	5. Cost	6. March 1, 1913, Value if Acquired Before That Date
\$.....	\$.....	\$.....
.....
61451.50	59576.50	
.....
.....
7. Cost of Improve- ments After Acqui- sition or March 1, 1913	8. Depreciation Al- lowed (or Allowable) Since Acquisition or March 1, 1913 (Furnish details)	9. Gain or Loss
\$.....	\$.....	\$.....
.....
		1875.00
.....
.....

Gain or Loss (enter net amount as Item 10) (capital losses are allowable only to the extent of \$2,000 plus capital gains)..... \$.....

State (1) how property was acquired—Cash purchase; (2) whether at time of sale or exchange purchaser owned more than 50% in value of your outstanding stock—No.

Every sale or exchange of stock should be reported in detail, including name and address of corporation, class of stock, number of shares, capital charges affecting basis (stock dividends, other nontaxable dividends, stock rights, etc.).

Cost of property must be entered in column 5 if a loss is claimed in column 9.

Plaintiff's Exhibit No. 28—(Continued)

SCHEDULE C—COMPENSATION OF OFFICERS

(See Instruction 15)

1. Name and Address of Officer	2. Official Title	3. Time Devoted to Business	Shares of Stock Owned 4. Common	5. Preferred	6. Amount of Compensation (Enter as Item 15)
R. M. Hardy	Yakima, Wash.	President	7447	.....	\$ None
L. R. Rightmire	" "	Treasurer	13	.....	"
Geo. H. Bradshaw	" "	Secretary	450	.....	"
.....

Note: Schedule C-1 in Duplicate also must be filed with this return if compensation in excess of \$15,000 was paid to any officer or employee.

Plaintiff's Exhibit No. 28—(Continued)

SCHEDULE D—COST OF REPAIRS

(See Instruction 17)

1. Items	2. Amount
	(Enter as Item 17)
Salaries and wages.....	\$.....
Other costs .....	.....
.....

SCHEDULE E—TAXES PAID

(See Instruction 19)

1. Items	2. Amount
	(Enter as Item 10)
.....	\$.....
.....
.....

SCHEDULE F—EXPLANATION OF DEDUCTION FOR
LOSSES BY FIRE, STORM, ETC.

(See Instruction 20)

1. Kind of Property	2. Date Acquired	3. Cost	4. Subsequent Improvements
-----	-----	\$-----	\$-----
-----	-----	-----	-----
-----	-----	-----	-----
5. Depreciation Allowable Since Acquisition	6. Insurance and Salvage Value	7. Deductible Loss (Enter as Item 20)	
\$-----	\$-----	\$-----	
-----	-----	-----	
-----	-----	-----	

State how property was acquired.....

Plaintiff's Exhibit No. 28—(Continued)

SCHEDULE G—BAD DEBTS

(See Instruction 21)

1. Year	2. Net Income	3. Sales on Account	4. Bad Debts
1931	\$.....	\$.....	\$.....
1932
1933
1934
1935

SCHEDULE H—INCOME FROM DIVIDENDS

(See Instruction 12)

Itemize below all dividends received during the year, stating the amount and the name and address of the corporation which declared the dividends.

(Sunshine Mining Co., Kellogg, Idaho \$ 1500.00)

Yakima First National Bank, Yak-
ima, Wash. 19021.87

20521.87

SCHEDULE I—EXPLANATION OF DEDUCTION
FOR DEPRECIATION

(See Instruction 23)

1. Kind of property (If buildings, state material of which constructed)	2. Date Acquired	3. Cost or March 1, 1913 Value if Acquired Prior to That Date (Indicate basis)
G.T.C. old bldg. Brick & Terra cotta	4-10-30	\$44500.00
.....
.....
.....

Plaintiff's Exhibit No. 28—(Continued)

4. Assets Fully Depreciated in Use at End of Year	5. Depreciation Al- lowed (or Allowable) in Prior Years	6. Remaining Cost or Other Basis to Be Recovered
\$-----	\$-----	\$-----
-----	-----	-----
-----	7915.77	-----
-----	-----	-----
-----	-----	-----
7. Life Used in Accumulating Depreciation	8. Estimated Re- maining Life From Beginning of Year	9. Depreciation Allowable This Year
-----	-----	\$-----
-----	-----	-----
5 yr.	20 yrs.	1780.00
-----	-----	-----
-----	-----	-----

[354]

AFFIDAVIT (See Instruction 46)

We, the undersigned, president (or vice president, or other principal officer) and treasurer (or assistant treasurer, or chief accounting officer) of the corporation for which this return is made, being severally duly sworn, each for himself deposes and says that this return (including its accompanying schedules and statements, if any) has been examined by him and is, to the best of his knowledge and belief, a true, correct, and complete return, made in good faith, for the taxable year stated, pursuant to the Revenue Act of 1934 and the Regulations issued thereunder.

[Corporate Seal]

R. M. HARDY

President

L. R. RIGHTMIRE

Treasurer

Sworn to and subscribed before me this 18th day of February, 1936.

[Notarial Seal]

L. B. ANDREWS

Notary Public

AFFIDAVIT (See Instruction 47)

I/we swear (or affirm) that I/we prepared this return for the person named herein and that the return (including its

Plaintiff's Exhibit No. 28—(Continued)

accompanying schedules and statements, if any) is a true, correct, and complete statement of all the information respecting the income tax and/or excess-profits tax liability of the person for whom this return has been prepared of which I/we have any knowledge.

(Signature of person preparing the return)

(Signature of person preparing the return)

(Name of firm or employer, if any)

Sworn to and subscribed before me this day of
-----, 193.....

[Notarial Seal]

(Signature of officer administering oath)

(Title)

B-4

[355]

YAKIMA HOLDING CORPORATION

Yakima, Washington

January 1, 1935 to December 31, 1935

Income

Interest	\$ 1,348.41	
Rentals—Guaranty Trust Company—		
Old Bldg.	4,184.47	
Dividends—Sunshine Mining Co.....	1,500.00	
Yakima First National		
Bank	19,021.87	
Profit on Sale Sunshine Mining Co.		
Stock	1,875.00	\$27,929.75

Expenses

Interest Paid	\$4,828.05	
Postage, Stationery &		
Printing	14.70	
Publishing Reports	15.12	
Taxes—Real Estate	\$ 1,047.31	
Capital Stock Tax	202.20	1,249.51

Plaintiff's Exhibit No. 28—(Continued)

State Corporation		
License Fee	285.50	
Revenue Stamps	105.56	
Telephone and Tele-		
graph	5.59	
Guaranty Trust Com-		
pany—Old Bldg. Ex-		
penses—		
Repairs	\$ 4.07	
Liability Insurance	31.05	
Plate Glass Insurance..	44.03	79.15
		<hr/>
Miscellaneous .....	.12	
Depreciation — Schedule		
“I”	1,780.00	8,363.30
	<hr/>	<hr/>
Net Income		\$19,566.45

ANALYSIS OF PROFIT AND LOSS STATEMENT
FOR COMPUTATION OF REPORTED LOSS

Gross Income as per Statement.....	\$27,929.75	
Less Deductible Income		
Dividends on Stocks of Domestic		
Corporations as Listed in Sched-		
ule “H”	20,521.87	\$ 7,407.88
	<hr/>	
Total Expenses as per Statement.....		8,363.30
		<hr/>
Net Deficit for Income Tax Report (Item		
27)		\$ 955.42
		B-5
		[356]

PLAINTIFF'S EXHIBIT No. 29

Name—VAMA FIRST NATIONAL BANK

Address—Yakima

 Brokerage
 Interest Rate.....% A

Old Balance	Date	Debit or Received	Credit or Delivered	Items	Interest as of	Price	Charges	Credits	Balance*	Date
	1933									
	June 6		200	Sunshine Mining		2.07		404.96	404.96*	6
404.96	7			Cheek			404.96		00*	7
(0)	Aug. 24	10		General Motors Corporation & P.		Reed	30			
			5	General Motors Corporation	8/25	32 ⁵ / ₈		157.88	157.88*	24
157.58	25			Ins. & Post. on 5 General Mtrs.			30		157.28*	25
157.28	31			Cheek			157.28		00*	31
(0)	Sep 11		5	General Motors Corporation		Divd				
00	18		3M	Fourth Liberty 4 ¹ / ₂ % 10/18 Called.	10/26	101 28/32		3,052.42	3,052.42*	18
3,052.42	19	3M		U. S. 4th Liberty Bond 4 ¹ / ₄ 1933-38						
				Ins. & Post.		Reed	60		3,051.82*	19
3,051.82	Oct 20			Cheek			3,051.82		00*	20
(0)	1934									
	Jan 27	2		U. S. Steel Corporation Comm I & P.		Reed	30			
			2	U. S. Steel Corporation Comm		55 ³ / ₈		105.57	105.27*	27
105.27	Feb 6			Cheek			105.27		00*	6
(0)	Apr 30			Federal Farm Mtg. Corp. $\frac{5}{8}$ 3/15/64		100 ¹ / ₂ Net		706.34		
			1500	Federal Farm Mtg. Corp. $\frac{5}{8}$ 3/15/64		100 ³ / ₄ Net		1,517.34		
				Cheeks			2,223.68		00*	30
00	May 1	2200		Federal Farm Mtg. 3 ¹ / ₄ % 5/64		Reed				
00	2			Cheek			917.43			
				Federal Farm Mtg. 3 ¹ / ₄ % 5/64	Net 101 18/32			917.88	.15*	2
.45	3	\$900		Federal Farm Mtg. 3 ¹ / ₄ % 5/64 1 & P.		Reed	45			
		1300		Do 1 & P.		Reed	45			
			1300	Do	Net 101 1/2			1,325.13		
				Cheek			1,324.68		00*	3
00	9		1400	Federal Farm Mtg. Corp. $\frac{5}{8}$ 3/15/64	Net 101 7/8			1,433.08		
			625	Home Owners Loan Corp. 1	Net 100			633.96		
633.96	10			Cheek	5/9		1,433.08		633.96*	9
				Cheek			3,893.32			
		1400		Federal Farm Mtg. Corp. $\frac{5}{8}$ 3/15/64		Reed				
		625		Home Owners Loan Corp. 1 Ins & Post.		Reed	45			
		3800		Federal Farm Mtg. Corp. $\frac{5}{8}$ 3/15/34 Ins. & Post.		Reed	80			
				Cheek			633.51		3,894.12*	10
3,894.12			3500	Federal Farm Mtg. Corp. $\frac{5}{8}$ 3/15/64	Net 102			3,587.38		
00	12		300	Federal Farm Mtg. Corp. $\frac{5}{8}$ 3/15/64	Net 101 3/4			306.74	00*	10
		\$100		Tacoma Washington Local Improvement District No. 4258 6% 2 17/40	Net Flat 90			90.00	90.00*	12
90.00	14	\$100		Tacoma Washington Local Improvement District No. 4258 6% Due 2/7/40		Reed				
				Draft			90.00		00*	14

Balance Forward

Plaintiff's Exhibit No. 29—(Continued)

Name—YAKIMA FIRST NATIONAL BANK

Address—Yakima, Washington

B

Interest Rate.....%

Old Balance	Date	Bought or Received	Sold or Delivered	Items	Interest as of	Price	Charges	Credits	Balance*	Date
	1934									
	09	May	19	5100	Federal Farm Mtg. Corp. 3 3/15/64	Ins. & Post.....	Reed	1.00		
					Check			5,190.85		
			4M	Federal Farm Mtg Corp. 3 3/15/64.....	Net	101 1/4		4,073.11		
			1100	Federal Farm Mtg Corp. 3 3/15/64.....	Net	101 3/8		1,118.74	00*	19
	00	22	2375	Home Owners Loan Corp. 4 1/2 Ins. & Post.....		Reed	.45			
			2375	Home Owners Loan Corp. 11	Net	100 1/4		2,418.14		
				Check			2,417.69		00*	22
	00	24	50	Great Western Sugar Co. 7% Cumulative Preferred Stock		111	5,565.00		5,565.00*	24
5,565.00		26		Payment Received				5,565.90	.90*	26
.90	June	8	1M	U. S. Treasury 3 3/4% 3/15/64.....	Net	106 3/16		1,070.63	1,071.53*	8
1,071.53		11		Check to National Bank of Commerce			1,070.84			
			1M	U. S. Treasury 4 3/4% 3/15/64.....		Reed				
.90		26		To Adjust Accrued Interest (M Treasury 4 3/4% due 3/15/56				.24	.90*	11
00		29	100	Ins & Post on 50 Great West Sugar Pfd.....			.90		00*	26
210.00	Jul	2		Commonwealth & Southern CP.....	7/2	2	210.00		210.00*	29
122.50		5		7/2 Dividend on 50 Great West Sugar Preferred.....				87.50	122.50*	2
877.80		6		Payment Received				210.30	87.80*	5
.30		10		Check			87.50		.30*	6
			10	Maytag First Preferred Stock		78 1/2		781.60		
			10	Maytag First Preferred Stock		79		786.60		
			5	Maytag First Preferred Stock		77 1/2		385.80	1,954.30*	10
1,954.30		11	25	Maytag First Preferred Stock Ins. & Post.....		Reed	.45		1,953.85*	11
1,953.85		13	50	Great Western Sugar Co. 7% Preferred.....		Divd			1,953.85*	13
1,953.85		17		Check			1,953.85		00*	17
		20	10	United Fruit Company	7/24	71 3/4	722.15		722.15*	20
722.15		21		Payment Received				722.45	.30*	21
.30		25		Ins & Post 10 United Fruit Common.....			.30			
				Check			3,326.90			
			3300	Federal Farm Mtg Corp. 1949 I & P.....		Reed	.60			
			3300	Do	Net	100 1/4		3,327.50	00*	25
		26	100	Commonwealth & Southern CP.....	7/30	1 1/2	160.00		160.00*	26
160.00		28		Payment Received				160.30	.30*	28
.30	Aug	2	4900	Federal Farm Mtg Corp. 1949 Ins. & Post.....	Net	100.00		4,931.85	4,932.15*	2
4,932.15		3		Federal Farm Mtg. Corp. 9 Ins. & Post.....		Reed	1.00			
				Check			4,930.85		.30*	3
.30		4	100	Sunshine Mining Co. Capital Stock.....		6.70	680.00		679.70*	4

Balance Forward

[358]

Plaintiff's Exhibit No. 29—(Continued)

Name—YAKIMA FIRST NATIONAL BANK

Address—Yakima, Washington

Brokerage

A

Interest Rate.....%

Old Balance	Date 1934	Bought or Received	Sold or Delivered	Items	Interest as of	Price	Charges	Credits	Balance*	Date
679.70	Aug 6		10	United Fruit Company Capital Stock.....		Divd			679.70*	6
679.70	7			Check				680.30	.60*	7
.60	13			Ins & Post. on 100 Sunshine Mining Co.....			.30			
				Certificate Charge on 100 Sunne Mining.....			.50		.20*	13
20	14			Ins. & Post. on 100 Commonwealth & Southern.....			.30		.50*	14
	20		100	Sunshine Mining Company Coal Stock.....		Divd				
00	27		100	Commonwealth & Southern Corporation Common.....		Divd				
.50	Sept 5	5000		U. S. Treasury 4% Reg. 1944 Ins. & Post.....		Reed	1.00			
			5000	U. S. Treasury 4% Reg. 12, 15.....	Net	106 1/2		5,325.00	5,323.50*	5
5,323.50	10			Check			5,369.00			
				Payment Received .....				.50		
				Accrued Interest on 5M U.S. Treas 4% Bonds Due 12/15/54.....				45.00	00*	10
00	12	1000		Home Owners Loan Corp. 3 5/8s & Post.		Reed	.45			
			1000	Home Owners Loan Corp. 3 7/8 1/52.....		94 1/4		942.50	942.05*	12
942.05	13			Check			953.05			
				Accrued Interest on 1M Home Owners Loan 3/52 to Date.....				11.00	00*	13
00	Oct 24		1200	Federal Farm Mortgage Corporation 3% Bonds Due 5/15/49.....	10/25	97 7/8 Net		1,190.50		
			1000	U. S. Treasury 3 1/4% Bond 10/15 45.....	10/25	102 1/16 Net		1,021.53		
				U. S. Treasury 3 1/4% Due 1945 Ins & Post.....		Reed	.45		2,211.58*	24
2,211.58	25	1000	1200	Federal Farm Mortgage Corporation 3% Bonds Due 5/15/49.....		Reed				
				Check			2,211.58		00*	25
00	26	775		Home Owners Loan Corporation 3 5/2.....		Reed				
				Ins & Post on Above .....			.45			
			775	Home Owners Loan Corporation 3% Bonds Due 5/1/52.....	Net	97 1/4		764.99		
				Check			764.54			
			4	American Telephone & Telegraph Common		110 1/4	446.36		446.36*	26
446.36	29			Received on Account				446.66	.30*	29
.30	30		200	United States Fourth Liberty Loan 4 1/4% 10/15/38 Uncalled.....		102 1/4 Net		204.88		
			300	United States Fourth Liberty Loan 4 1/4% 10/15/38 Called.....		101 Net		303.57	508.75*	30
508.75	31	200		Fourth Liberty Loan 4 1/4% D1938.....		Reed				
		300		Fourth Liberty Loan 4 1/4% D1938 Called.....		Reed				
				Ins & Post on Above.....			.30		508.45*	31

Balance Forward

[359]

[Printer's Note] Figures in italics typed in red.

Plaintiff's Exhibit No. 29—(Continued)

Name—YAKA FIRST NATIONAL BANK

Addr—Yakima, Washington

Interest Rate.....%

Brokerage

B

Old Balance	Date	Bought or Received	Sold or Delivered	Items	Interest as of	Price	Charges	Credits	Balance*	Date
	1934									
508.45	Nov 1			Check			508.15			
			600	Home Owners Loan Corporat 3% Bonds Due 5/1/52.....		97½ Net		585.05	585.35*	1
585.35	2			Check			584.60			
		600		Home Owners Loan Corporat 3% Bonds Due 5/1/52 Ins & Post		Reed	.45		.30*	2
.30	3	14		Pacific Power & Light Comp 7% Preferred Stock Ins & Post		Reed	.30			
			14	Pacific Power and Light Comp 7% Preferred Stock.....	Net	28½		398.30	398.30*	3
398.30	7		200	Home Owners Loan Corporat 2¾% Bonds Due 8/1/49.....	Net	93¾		188.98	587.28*	7
587.28	8			Check			586.98		.30*	8
		200		Home Owners Loan Corporat 2¾% Bonds Due 1949.....		Reed				
.30	9	2050		Federal Farm Mortgage Corpn 3% Due 5/15/49.....		98.0625	2,040.69		2,040.39*	9
2,040.39	10			Payment Received				2,040.69	.30*	10
.30	13			Payment Received .....				.45	.75*	13
.75	13	2000		Federal Farm Mortgage Corpn						
As of 11/9				3% Due 5/15/49.....		98.0625	1,990.91			
	13		2050	Federal Farm Mortgage Corpn 3% Due 5/15/49.....		98.0625		2,040.69	50.53*	13
Cancellation of Your Purchase From Us on 11/9/34										
	14		2000	Federal Farm Mortgage Corpn 3% Bonds Due 5/15/49		Dvd				
50.53	15	5000		Sunshine Mining Common & Post.....		Reed	9.00			
			500	Sunshine Mining Company Comon.....		12¼		6,022.33		
			100	Sunshine Mining Company Comon.....		12¼		1,191.93		
			100	Sunshine Mining Company Comon.....		12¼		1,191.93		
			100	Sunshine Mining Company Comon.....		12¼		1,191.93		
			400	Sunshine Mining Company Comon.....		12¼		4,767.86		
			100	Sunshine Mining Company Comon.....		12¼		1,191.93		
				Ch Transfer Fee 5M Sunshining \$25.						
				Federal Tax 1c 2.....			27.00			
				Ins & Post 2M Federal Farm 3/49.....			.45			

Balance Forward

[360]

[Printer's Note] Figures in italics typed in red.

Plaintiff's Exhibit 1, 29—(Continued)

Name—YAKIMA FIRE NATIONAL BANK

Address—Yakima, Washington

Brokerage A

Interest Rate.....%

Old Balance*	Date	Bought or Received	Sold or Delivered	Items	Interest as of	Price	Charges	Credits	Balance*	Date
	1934									
	Nov 15			Interest Prepayment 1300 Shares Sunse Mining Company			15.52			
				Check			49.78			
				Check			15,506.39		.30*	15
.30	19			Insurance and Postage on 4 American Phone & Telegraph			.30		.00*	19
00	20		400	Sunshine Mining Company Capital St.....	117 $\frac{3}{8}$			4,667.86		
			500	Sunshine Mining Company Capital St.....	117 $\frac{3}{8}$			5,834.84		
			300	Sunshine Mining Company Capital St.....	117 $\frac{3}{8}$			3,500.88		
			100	Sunshine Mining Company Capital St.....	117 $\frac{3}{8}$			1,166.93		
			400	Sunshine Mining Company Capital St.....	117 $\frac{3}{8}$			4,667.86		
			100	Sunshine Mining Company Capital St.....	117 $\frac{3}{8}$			1,166.93	21,005.30*	20
11/10/30	21	700		Federal Farm Mortgage 3% Bonds Due 9/9/49 Ins & Post.....		Reed	.45			
		10		Transamerica Corporation Common.....		Reed				
				Transfer Fee and Tax on 1000 Sunshine Mining Company						
				Stock			5.40			
			700	Federal Farm Mortgage Corporation 3 Bonds Due 5/15/49	Net	97 $\frac{3}{4}$		684.66		
			100	Sunshine Mining Company Capital St.....	12			1,179.43		
			100	Sunshine Mining Company Capital St.....	12 $\frac{1}{8}$			1,191.93		
			100	Sunshine Mining Company Capital St.....	12			1,179.43		
			400	Sunshine Mining Company Capital St.....	12			4,717.86		
			400	Sunshine Mining Company Capital St.....	12			4,717.86		
			500	Sunshine Mining Company Capital St.....	12			5,897.34		
			500	Sunshine Mining Company Capital St.....	12			5,897.34		
			500	Sunshine Mining Company Capital St.....	117 $\frac{3}{8}$			5,834.84	52,300.14*	21
52,300.14	22	1000		Sunshine Mining Company Capital & P.....		Reed	3.60			
				Federal Tax on Transfer 5M Sunshine \$2.00						
				Transfer Fee on 5M Sunshine Mining \$25.00.....			27.00			
				Check			21,005.30			
				Check			684.21			
			100	Sunshine Mining Company Capital St.....	12			1,179.43		
			200	Sunshine Mining Company Capital St.....	12			2,358.91		
			10	Transamerica Corporation Common St.....	51 $\frac{1}{2}$			49.29	34,167.66*	22
34,167.66	23			Check			22,347.38			
			23	Dupont de Nemours & Company	98 $\frac{3}{4}$			2,255.66	14,075.94*	23
		24		Dupont Company Common Stock 1 & Post.....		Reed	.30			
		5000		Sunshine Mining Company Capital & P.....		Reed	9.00		14,066.64*	24
14,066.64	26	2700		Federal Farm Mortgage Corporation 3 Bonds Due 5/15/49	Net	98 $\frac{1}{2}$		2,662.20	16,728.84*	26
									Balance Forward	

Plaintiff's Exhibit No. 29—(Continued)

Name—YAKA FIRST NATIONAL BANK

Address—Yakima, Washington

Brokerage
Interest Rate.....%

B

Old Balance	Date	Bought or Received	Sold or Delivered	Items	Interest as of	Price	Charges	Credits	Balance*	Date
	1934									
16,728.84	Nov 27	2700		Federal Farm Mortgage Corporation 3% Bonds Due 1949						
				Ins & Post.....		Reed	.60			
			300	Sunshine Mining Company Capital Stock.....		121 $\frac{3}{8}$		3,375.88		
			100	Sunshine Mining Company Capital Stock.....		121 $\frac{3}{8}$		1,191.93		
			100	Sunshine Mining Company Capital Stock.....		121 $\frac{3}{8}$		1,191.93	22,687.98*	27
22,687.98	28		100	Sunshine Mining Company Capital Stock.....		121 $\frac{3}{8}$		1,191.93		
			100	Sunshine Mining Company Capital Stock.....		121 $\frac{3}{8}$		1,191.93		
				Check			14,508.88			
				11/28/34 Dividend on 23 Dupont de Nemours Company Common at .65 per Share and 5 Extra.....			18.40		10,544.56*	28
10,544.56	Dec 1			Check			10,544.56		00*	1
	3		4	American Telephone & Telegraph Company Capital Stock.....		Divd				
00	7	100		Sunshine Mining Company Capital Stock.....		Reed				
				Ins & Post on Above .....			.30		.30*	7
	5		100	Sunshine Mining Company Common.....		117 $\frac{3}{8}$		1,166.93	1,166.63*	5
1,166.63	13			Check			1,166.63		00*	13
00	26		400	Sunshine Mining Company Capital Stock.....		13		5,117.85		
			100	Sunshine Mining Company Capital Stock.....		13		1,279.43	6,397.28*	26
6,397.28	27		100	Sunshine Mining Company Capital Stock.....		123 $\frac{3}{4}$		1,254.43		
			100	Sunshine Mining Company Capital Stock.....		123 $\frac{3}{4}$		1,254.43		
			500	Sunshine Mining Company Capital Stock.....		123 $\frac{3}{4}$		6,272.28		
			100	Sunshine Mining Company Capital Stock.....		123 $\frac{3}{4}$		1,254.43		
17,687.28	28		100	Sunshine Mining Company Capital Stock.....		123 $\frac{3}{4}$		1,254.43	17,687.28*	27
				Check			6,397.28			
			200	Sunshine Mining Company Capital Stock.....		123 $\frac{3}{4}$		2,508.90		
			200	Sunshine Mining Company Capital Stock.....		123 $\frac{3}{4}$		2,508.90		
			400	Sunshine Mining Company Capital Stock.....		123 $\frac{3}{4}$		5,017.85	21,325.65*	28
21,325.65	31			Check			12,150.00			
				Check			10,032.41			
				Interest Prepayment Proceeds on Sunshine Mining Company			3.34			
	1935			12/31/34 Dividend 4300 Sange Mining Company Common	12/31			860.00	00*	31
00	Jan 4	10		General Motors Common 1% Post		Reed	.30		.30*	4
30	5		10	General Motors Common St.		33 $\frac{3}{8}$		328.29	327.99*	5
327.99	7			Ins on Prepayment 10 General Motors .....			.33			
				Check			327.66		00*	7

Balance Forward

[362]

Plaintiff's Exhibit A 29--(Continued)

Name--YAKIMA FIE NATIONAL BANK

Address--Yak, Washington

Brokerage A

Interest Rate.....%

Balance	Date	Bought or Received	Sold or Delivered	Items	Interest as of	Price	Charges	Credits	Balance*	Date
	1935									
00	Jan	10		To Reverse Charge November Short 144 on 23 Dupont Common Stock Stock Transferred Time for Dividend				18.40		
				Check			18.40		00*	10
00	Feb	5	10000	1 S. Treasury 2 1/8% Note Due 6/15/3		Reed				
			10000	1 S. Treasury 2 1/8% Note Due 6/15/3		101.71875		10,202.82	10,202.82*	5
10,202.82	7	2200	2200	Federal Farm Mortgage Corporation 3 Bonds Due 1949...		Reed				
				Federal Farm Mortgage Corporation 3 Bonds Due 5/15/49		100.4375		2,221.85	12,127.67*	7
12,427.67				Check			10,202.82		2,224.85*	7
2,224.85				Check			2,224.85		00*	8
00	18	100		Sunshine Mining Company Common & P.....		Reed	.30			
			100	Sunshine Mining Company Common.....		12 1/4		1,204.43		
				Check			1,202.93			
				Interest on Prepayment		1.20			00*	18
00	27	1000		Pennsylvania Power & Light Company 2% Bond Due 1981						
				Ins & Post		Reed	.45			
			1000	Pennsylvania Power & Light Company % Bond Due 4/1/81	Net	102 1/4		1,040.48	1,040.03*	27
1,040.03	28			To Cancel Ins & Post on 1M Pennsylvania Power & Light Bond				.45		
			500	Sunshine Mining Company Capital		121 1/2		6,147.33		
			500	Sunshine Mining Company Capital		121 1/2		6,147.33		
				Check			1,040.48		12,291.66*	28
12,291.66	Mar	1	3500	Sunshine Mining Company Capital St.....		Reed				
				Ins & Post on Above			9.10			
			7000	City of Yokohama 6% Due 1961		Reed				
			400	Sunshine Mining Company Capital St.....		121 1/2		4,917.86		
			300	Sunshine Mining Company Capital St.....		123 1/4		3,725.88		
			200	Sunshine Mining Company Capital St.....		125 1/4		2,483.90		
			300	Sunshine Mining Company Capital St.....		125 1/4		3,725.88		
			100	Sunshine Mining Company Capital St.....		125 1/4		1,241.93		
			300	Sunshine Mining Company Capital St.....		125 1/4		3,725.88		
			200	Sunshine Mining Company Capital St.....		125 1/4		2,483.90		
			500	Sunshine Mining Company Capital St.....		127 1/8		6,331.78		
			500	Sunshine Mining Company Capital St.....		123 1/4		6,272.33		
			500	Sunshine Mining Company Capital St.....		123 1/4		6,272.33		
			300	Sunshine Mining Company Capital St.....		125 1/4		3,725.79		
			300	Sunshine Mining Company Capital St.....		125 1/4		3,725.88		

Balance Forward

[363]

Plaintiff's Exhibit 29—(Continued)

Name—YAKIMA FIRE NATIONAL BANK
Address—Yakima, Washington

Brokerage A
Interest Rate.....%

Old Balance	Date	Bought or Received	Sold or Delivered	Items	Interest as of	Price	Charges	Credits	Balance*	Date
	1935									
	Apr 16			Interest on Prepayment of 8 American L. & Tel. Capital....			.84			
			300	Sunshine Mining Company Capital.....		15.50		4,588.31		
			8	American Telephone & Telegraph Comm Stock.....		106 $\frac{1}{8}$		845.26	49,330.09*	16
49,330.09	17			Check			44,741.78			
		2500		Sunshine Mining Company Capital.....	I & P	Reed	5.70			
				Certificate Charge on 2500 Above.....			12.50			
				Transfer Tax on Same 2500 Shs.....			.12		4,569.99*	17
4,569.99	18			Check			4,588.31		18.32*	18
18.32	22		500	Sunshine Mining Company Capital.....		15.50		7,647.30		
			200	Sunshine Mining Company Capital.....		15.50		3,058.84	10,687.82*	22
10,687.82	23	2000		Alleghany Corporation 5% Bond Due 3/44 Ins & Post.....		Reed	.45			
			1300	Sunshine Mining Company Capital.....		16 $\frac{1}{2}$		21,182.80		
			500	Sunshine Mining Company Capital.....		16 $\frac{1}{2}$		8,147.29		
			100	Sunshine Mining Company Capital.....		16 $\frac{1}{4}$		1,654.42		
			1500	Sunshine Mining Company Capital.....		16 $\frac{3}{4}$		24,816.77		
			600	Sunshine Mining Company Capital.....		16 $\frac{3}{8}$		9,851.62		
			2000	Alleghany Corporation 5% Bonds Due 1/44.....		70 $\frac{3}{4}$		1,424.00	77,764.27*	23
77,764.27	24			Certificate Charge on 5000 Shs Sunshine Mining Company.....			25.00			
		†1500 short		Ins & Post on Same Stock.....			.20			
				Check			10,706.14			
		1000		Missouri Pacific Railroad 5% —F— B4 Due 3/1/77.....		Reed				
		5000		Sunshine Mining Company Capital.....	I & P	Reed	13.50			
		1000		Missouri Pacific Railroad 4% General Mortgage Bond Due 3/1/75	I & P	Reed	.45			
		5000		New Orleans & Texas 5% Bonds 1935.....		15 $\frac{1}{2}$		757.98		
		5000		New Orleans & Texas 5% Bonds 1935.....		15 $\frac{3}{8}$		751.73		
		8000		Alleghany Corporation 5% 2/1/44.....		70 $\frac{3}{8}$		5,697.12		
		1000		Missouri Pacific Railroad 4% Bond Due 3/1/75.....	Flat	6 $\frac{1}{4}$		62.09		
		100		Sunshine Mining Company Capital.....		17.55		1,737.46		
		100		Sunshine Mining Company Capital.....		17 $\frac{1}{2}$		1,732.46		
		1000		Sunshine Mining Company Capital.....		17		16,794.53		
		500		Sunshine Mining Company Capital.....		17 $\frac{1}{2}$		8,647.28		
		500		Sunshine Mining Company Capital.....		17 $\frac{1}{2}$		8,647.10		
		1000		Missouri Pacific Railroad —F— Bonds Due 3/1/77.....	Flat	217 $\frac{3}{8}$		213.34	112,060.07*	24
									Balance Forward	

Drumheller, Ehrlichmann & White

[Printer's Note] : Figures in italics typed in red. †Pencil notation.

Plaintiff's Exhibit, 29— (Continued)

Name—YAKIMA FIRE NATIONAL BANK

Address—Yakima, Washington

Brokerage
Interest Rate.....% B

Old Balance	Date	Bought or Received	Sold or Delivered	Items	Interest as of	Price	Charges	Credits	Balance*	Date
	1935									
11,060.07	Apr 25			Certificate Charge on 5000 Sunshine Mining Company Common			25.00			
				Transfer Tax on Same Stock.....			.20			
				Cheek			40,817.81			
				Ins & Post on Miscellaneous Bonds.....			8.40			
100				Sunshine Mining Company Capital.....	19%		1,980.00			
10000				New Orleans Texas & Mexico Railway %—A— Bonds Due						
				10/1/35 1 & P.....		Reed	.45			
8000				Alleghany Corporation 5% Convertible Bonds Due 2/1/44						
				1 & P.....		Reed	1.20			
5000				Sunshine Mining Company Capital & P.....		Reed	15.00			
10000				Southern Railway 5% Bonds Due 1/1/44.....		Reed				
10000				Associated Telephone Utilities 5 1/2/44.....		Reed				
1000				Buffalo Rochester & Pittsburgh RR. 4% Bond Due 5/1/57		Reed				
10000				Baltimore & Ohio Railroad 5% Bonds due 3/1/2000.....		Reed				
10000				Erie Railway 5% Refunding & Improvement Bonds Due						
				4/1/75		Reed				
10000				Denver & Rio Grande Railroad 4% Bds Due 7/1/36.....		Reed				
10000				Great Northern Railroad 4 1/2% Bonds due 7/1/76.....		Reed				
5000				Missouri Pacific Railroad 5% Bonds Due 3/1/77.....		Reed				
10000				Erie Railway 4% General Lien Bonds due 1/1/96.....		Reed				
1000				Sunshine Mining Company Capital.....	19 1/2		19,294.44			
5000				Missouri Pacific R. R. 5% Bonds 3/1/77.....	21.875		1,076.72			
400				Sunshine Mining Company Capital.....	19 3/4		7,817.80			
300				Sunshine Mining Company Capital.....	19		5,638.34			
700				Sunshine Mining Company Capital.....	19 1/2		13,243.69			
10000				Erie Railway General Lien 4% Bonds due 1/1/96.....	74 1/2		7,509.46			
10000				Southern Railway First Consolidated 5% Bonds Due 1/1/94	88.50		8,979.71			
1000				Buffalo Rochester & Pittsburgh Ry. 4% Consolidated Mtg						
				5/1/57	56.875		585.58			
10000				Great Northern R. R. 4 1/2% Gne. —D—Bonds Due 7/1/76.....	70		7,113.50			
10000				Denver & Rio Grande R. R. 4% 7/1/36.....	25.50		2,515.94			

Balance Forward

[366]

[Printer's Note] : Figures in italics typed in red.

Plaintiff's Exhibit p. 29--(Continued)

Name—YAKIMA FIRE NATIONAL BANK

Address—Yakima, Washington

Brokerage A

Interest Rate.....%

Old Balance	Date	Bought or Received	Sold or Delivered	Items	Interest as of	Price	Charges	Credits	Balance*	Date
	1935									
	Apr 25		10000	Erie Railway 5% Refunding & Improvement Bonds Due 4/1/75		60.25		6,029.89		
			8000	Ass'd Telephone Utilities 5½% —C— Bonds Due 5/1/44.....	Net	17		1,356.80		
			2000	Ass'd Telephone Utilities 5½% —C— Bonds Due 5/1/44.....	Net	17		339.20		
			300	Sunshine Mining Company Capital.....		19¼		5,713.34		
			600	Sunshine Mining Company Capital.....		19¾		11,726.64		
			10000	Baltimore & Ohio R. R. 5% Refunding & General Mortgage 3/1/2000		61.25		6,171.56	174,324.62*	25
174,324.62	26	10000		Chicago & Northwestern Railway 4½% Bonds Due 5/1/2037		Reed				
		1000		Buffalo Rochester & Pittsburgh Railway 4½% Bond Due 5/1/57		Reed				
		4000		Missouri Pacific Railroad 5% First & Funding —F— Bonds 3/1/77		Reed				
				Ins & Post on Miscellaneous Bonds.....			1.00			
				Payment Received				1,980.30		
			9000	Chicago Northwestern Railway 4½% C— Bonds Due 5/1/2037		19.875		1,925.74		
			1000	Chicago Northwestern Railway 4½% C— Bond Due 5/1/2037		20		215.22		
			6000	Missouri Pacific R. R. 5% —F— Bonds Due 3/1/77.....		21.875		1,292.07		
			1000	Buffalo Rochester & Pittsburgh 4½% Bonds Due 5/1/57.....		56.875		588.21		
			4000	Missouri Pacific R. R. 5% —F— Bonds Due 3/1/77.....		21.875		861.38		
			500	Sunshine Mining Company Capital.....		23		11,392.22		
			500	Sunshine Mining Company Capital.....		22		10,892.23		
			500	Sunshine Mining Company Capital.....		21		10,392.34	213,863.23*	26
213,863.23	27	10000		Missouri Pacific Railroad 5% Bonds Due 3/1/77 Ins & Post		Reed	.45			
			4000	Missouri Pacific Railroad 5% Bonds Due 3/1/77.....		21.875		861.38	214,724.16*	27
214,724.16	29	100		Sunshine Mining Company Capital.....	I & P	Reed	.45			
		1000		Buffalo Rochester & Pittsburgh Ry. 4% Bond Due 5/1/57 I & P		Reed	.45			
			100	Sunshine Mining Company Capital.....		21½		2,128.40		
			1000	Buffalo Rochester & Pittsburgh Ry. 4% Bond Due 5/1/57		56.375		560.83	217,412.49*	29

Balance Forward

[367]

[Printer's Note] : Figures in italics typed in red.

Plaintiff's Exhibit

Name—YAKIMA FID

Address—Yak

Old Balance	Date	Bought or Received	Sold or Delivered	Items
	1935			
217,412.49	Apr 29		100	Sunshine Mining Company Capital.....
219,503.39	30			Check
			10000	Minneapolis St. Paul Sault Ste. Mar
As of 4/26/35				Due 7/1/38
133,583.32	May 1			Check
				Check
				Check
			10000	Minneapolis St. Paul Sault Ste. Mar
				Due 7/1/38 I & P.....
		100		Sunshine Mining Company Capital.....
9,110.94	2			Check
5,521.39	3	50		Sunshine Mining Company Capital.....
				3/1/33 Coupon 1M Missouri Pacific R
				Check
2,200.89	4	7000		Buffalo Rochester & Pittsburgh R. R. 41
				Ins & Post.....
As of 4/30/35			7000	Buffalo Rochester & Pittsburgh R. R. 41
				Payment Received
8,217.14	6			Check
				Check
				Payment Received
1,815.80	7		10000	Florida East Coast Ry. First & Refun
				9/1/74 —A—
2,819.27	8	10000		Florida East Coast Railway 5% First & 1
				9/1/74 I & P.....
2,818.82	9	52		Equity Fund Incorporated Common....
			52	Equity Fund Incorporated Common....
				Check
1,159.00	10			Check
		10000		Richfield Oil Company of California 6
				I & P.....
			10000	Richfield Oil Company of California 6
4,218.52	13			Check
20.30	14			5/1/35 Coupon on 1M Buffalo Rochester
				Check
		18		Chrysler Corporation Common I & P.

[Printer's Note] : Figures in italics typed in red.

Plaintiff's Exhibit No. 29—(Continued)

Name—YAKIMA FIRE NATIONAL BANK

Address—Yakima, Washington

Brokerage A
Interest Rate.....%

Old Balance	Date	Bought or Received	Sold or Delivered	Items	Interest as of	Price	Charges	Credits	Balance*	Date
	1935									
	May 14	5		Pure Oil Company Preferred Stock.....		Reed				
		44		Pure Oil Company Common Stock.....		Reed				
		12		Goodyear Tire & Rubber Company Preferred Stock.....		Reed				
		10000		Seaboard Airline Railway 4% Bonds Due 10/1/59.....		Reed				
			18	Chrysler Motors Common Stock.....		45		804.21		
			10000	Seaboard Airline 4% Refunding Bonds Due 10/1/59.....	Net	4		396.00	1,220.21*	14
1,220.21	15		10000	Certificate of Deposit for Alleghany Corporation 5/50—Registered	Net	16.25		1,621.00		
			44	Pure Oil Company Common Stock.....		8 3/4		339.91	2,805.12*	15
2,805.12	16	5000		Pacific Gas & Electric Company 4 1/4% Bond Due 1960.....		Reed				
		10000		Canadian National Railways Company Bonds Due 1969....		Reed				
		10000		Rhine Westphalia Electric Company Bond Due 1955....		Reed				
		10000		Certificate of Deposit for St. Louis San Francisco 4% Bonds Due 1950		Reed				
		10000		Chesapeake Corporation 5% Due 1947.....		Reed				
		10000		Remington Rand Company 5 1/2% Due 1947.....		Reed				
			10000	Canadian National Railways Company Bonds Due 7/1/69	Net	114.50		11,643.06		
			6000	Certificate of Deposit for St. Louis San Francisco Ry. Co. 4% 7/1/50	Net	9.50		567.60		
			10000	Chesapeake Corporation 5% Convertible Trust Bonds Due 5/15/47	Net	103.75		10,377.94		
		5000		Pacific Gas & Electric —F— 4 1/2% Bonds Due 6/1/60.....	Net	106		5,403.63		
		10000		Remington Rand Inc. —A— 5 1/2% Bonds Due 5/1/47.....		102.875		10,312.53		
		10000		Rhine Westphalia Electric Power 6% Bonds Due 4/1/55.....	Net	37 1/4		3,721.00		
		5		Pure Oil Company 8% Preferred Stock.....		68		334.54	45,165.42*	16
13,165.42	17			Ins & Post on 100 Sunshine Mining.....			.30		45,165.12*	17
13,165.12	20			Check			43,524.42			
				Collection Charge on \$600 Rhine-Westphalia Elec. Pwr. Coupons \$300 Due 4/1/34 & \$300 Due 10/1/33.....			.50			

Balance Forward

[369]

(Printer's Note) : Figures in italics typed in red.

Plaintiff's Exhibit 29—(Continued)

Name—YAKIMA FIRE NATIONAL BANK

Address—Yakima Washington

Brokerage
Interest Rate.....%

B

Old Balance	Date	Bought or Received	Sold or Delivered	Items	Interest as of	Price	Charges	Credits	Balance*	Date
	1935									
	May 20	300		Rhine Westphalia Electric Power Comps Due 4/1/34.....		Reed				
		300		Rhine Westphalia Electric Power Comps Due 10/1/33.....		Reed				
		10000		Achison Topeka & Santa Fe Railway 4% Con. Debentures 12/1/48		Reed				
		10000		Certificate of Deposits for 5% Allegheny Corporation Bonds Due 4/1/50		Reed				
		10000		New York Central & Hudson River Road 4½% Refund- ing & Improvement Bonds Due 11/20/13.....		Reed				
		1000		Certificate of Deposit for St. Louis San Francisco Railroad Company 4% Bonds Due 7/1/50.....	Net	9		89.60		
		10000		Achison Topeka & Santa Fe Railway Company 4½% Bonds Due 12/1/48	Net	105.75		10,784.75		
		10000		New York Central & Hudson River 4½% —A— Bonds Due 10/1/2013	Net	57.25		5,784.75	18,299.30*	20
18,299.30	21			Check			20.00			
		2000		Certificate of Deposit St. Louis San Francisco R. R. 4% —A— Bonds Due 7/1/50.....	Net	9		179.20	18,458.50*	21
18,458.50	22			Check			16,659.10			
		1000		Certificate of Deposit St. Louis & San Francisco 4% Bond Due 7/1/50	Net	9		89.60		
				Cancel Ins. & Post. on 18 Chrysler.....				.30	1,889.30*	22
1,889.30	23			Check			268.80			
		5000		Interboro Rapid Transit First and Refunding 5% Bonds Due 1/1/66	Net	89½		4,574.39	6,194.89*	23
6,194.89	24	5000		Interboro Rapid Transit Company 5% First & Refunding 1/1/66		Reed				
				Check			4,574.39		1,620.50*	24
1,620.50	28			Check Covering 10M Allegheny Corp.....	5/50		1,621.00		.50*	28
	29		100	Sunshine Mining Company Capital.....		Dlvd				
50	31			To Cancel Collection Charge of 5/20/31.....				.50	60*	31
	June 3		12	Goodyear Tire & Rubber Company First Preferred Stock.....		Dlvd				
		3200		U. S. Treasury 27½% Bonds Due 3/15/55.....		101½%	3,272.19		3,272.19*	3
3,272.19	4	1000		City of Vienna 6% Due 11/1/52 I & 2.....		Reed	.45			
		1000		City of Vienna 6% Due 11/1/52.....	Net	85½%		858.75	2,413.89*	4

Balance Forward

[370]

Printer's Note : Figures in italics typed in red.

Plaintiff's Exhibit 29—(Continued)

Name—YAKIMA FIRE NATIONAL BANK

Address—Yak., Washington

Dealer

~~Brokerage~~

A

Interest Rate.....%

Old Balance	Date	Bought or Received	Sold or Delivered	Items	Interest as of	Price	Charges	Credits	Balance*	Date
2413.89	June 7		3200	U. S. Treasury 27½% Bonds Due 3/15/60.....		Dlvd				
				Coupons Off 1M City of Vienna 6% 11 Due 1952—Prices Below: Nov. '32—127 May '33—11 Nov. '33—108 May '34—96 Nov '34—96 May '35—96.....				185.20		
				Payment Received				3,272.19	1,043.50*	7
1,043.50	8			Check			1,043.50		00*	8
	12	525 Reichsmark		Partial Payment on 10/1/33 Coupons in 10M Rhine West- phalia Electric Power Bonds Due 1/55—6% I & P		Reed	.30		.30*	12
.30	14		10	Crane Company Common Stock.....		14		134.57	134.27*	14
134.27	15	10		Crane Company Common Stock 1 &		Reed	.30		133.97*	15
133.97	20	400 Reichsmark		Payment of the 4/1/34 Coupons From 1 Rhine-Westphalia Electric Power Corporation Bond—D—.....		Reed				
				Check			134.27		.30*	20
.30	22		5	Washington Water Power Company \$6 preferred Stock.....	Net	90		449.75	449.45*	22
449.45	24	5		Washington Water Power Company \$6 preferred Stock.....		Reed				
			525	Reichsmarks 1934 .....		.06½%		33.78		
				Check			449.45		.33.78*	24
33.78	25			Check			33.78		00*	25
00	June 26	10000		U. S. Treasury 2½% Bonds Due 6/15/.....		Reed				
			10000	U. S. Treasury 2½% Bonds Due 6/15/.....		103 15/32		10,353.85	10,353.85*	26
10,353.85	27			Check			10,353.85		00*	27
00	29			6/29/35 Dividend on 1550 Sunshine Mfg Common Stock....	6/29			465.00	465.00*	29
465.00	July 1			Check			465.00		00*	1
	2		400	Reichsmarks for 4/1/34 Coupons Frc Rhine Westphalia Electric Power Corporation Bonds Net Flat.....		.06½%		25.50	25.50*	2
25.50	3			Check			25.50		00*	3
00	8		10	Borg-Warner Corporation Common Stc.....		41½		409.24		
			10000	U. S. Treasury 2½% Due 6/15/39.....		103.56250		10,370.18	10,779.42*	8
10,779.42	9			Check			10,370.18		409.24*	9
409.24	12		40	General Motors Company Common Sto.....		35		1,387.87	1,797.11*	12
4797.11	15			Check			409.24		1,387.87*	15
1,387.87	17		10	Chrysler Corporation Common Stock		53½	529.23	529.23	1,917.10*	17
1,917.10	20			Check			1,387.87		529.23*	20

Balance Forward

[371]

[Printer's Note] : Figures in italics typed in red.

Plaintiff's Exhibit No. 29—(Continued)
 Name—NATIONAL BANK OF COMMERCE OF SEATTLE
 YAKIMA BRANCH
 Address—Yakima, Washington

Old Balance	Date	Bought or Received	Sold or Delivered	Items	Interest as of	Price	Charges	Brokerage		Balance*	Date
								Interest	Rate.....%		
	1935										
529.23	July 22		200	Warner Brothers Pictures Common Stock 4 1/4.....					823.28	1,352.51*	22
1,352.51	23			Check			529.23			823.28*	23
823.28	25	20		American Radiator Common Stock.....		163/4	341.70			481.58*	25
		10000		Port of Seattle 5% Due 4/1/50.....		113.64	131.45	111.564.31			
481.58	26			Payment Received					341.70	823.28*	26
823.28	29			Check			823.28			00*	29
00	31		500	U. S. Brazil 8% Due 6/1/41 Flat.....	Net	24			120.00	120.00*	31
120.00	Aug 1			Check			120.00			00*	1
00	21		1175	Home Owners Loan Corp'n. 23 1/4% Bonds Due 8/1/49.....	Net	99.75			1,173.94	1,173.94*	21
1,173.94	22			Check			1,173.94			00*	22
00	27		3400	Federal Farm Mortgage Corporation 3% 1/15/47.....		100.125			3,416.43	3,416.43*	27
3,416.43	28			Check			3,416.43			00*	28
00	Sept 5		5000	Richfield Oil of Calif. Bonds 6% Due 1944.....		31 1/4			1,545.01	1,545.01*	5
1,545.01	9			Proceeds 90 German Reichmarks.....					6.08	1,551.09*	9
1,551.09	11			Check			1,545.01				
				Check			6.08			00*	11
00	16		500	Sunshine Mining Co. Common Stock.....		21 1/2			10,640.37	10,640.37*	16
10,640.37	17	25		Same		10 1/2	518.85			10,121.52*	17
10,121.52	19			Payment Received					519.15	10,640.67*	19
10,640.67	23			Check			10,640.67			00*	23
00	27		1000	U. S. Treasury 3% Due 6/15/48—46.....		101 3/8			1,022.33	1,022.33*	27
1,022.33	28			Check			1,022.33			00*	28
00	30			9/30/35 Dividend on 1500 Sunshine Mining Co. Capital at 40¢ per Share							
600.00	Oct 3		1	American Telephone & Telegraph Co. Common.....		135 3/8			600.00	600.00*	30
729.98	8			Check			129.98		129.98	729.98*	3
				Check			600.00			00*	8
00	9		6	Curtiss Wright Corp'n. Common Stock.....		27 3/4			14.52		
			5	Marshall Fields & Co. Common Stock.....		9 1/2			44.64		
			3	United Aircraft Corp'n. Common Stock.....		185 5/8			50.74		
			1/2	United Airlines Corp'n. Vte for Common Stock.....		83 3/8			4.12		
			1	Same		9 1/4			6.67		
			10	Shell Union Corp'n. Common Stock.....		9			84.29		
			1	Radio Corp'n. of America Common Stock.....		7 1/8			6.55		
			3	Nash Motors Co. Common Stock.....		15 1/8			42.66		
			3/4	Bering Airplane Co. Common Stock.....		137 3/4			7.84		
			3	Internatl. Paper Co. 7% Cumulative Pfd. Stock—New.....		15 5/8			41.16	306.15*	9

Balance of A/c in name of National Bank of Commerce Yakima Branch

Balance Forward

[Printer's Note] : Figures in italics typed in red.

[372]

Plaintiff's Exhibit, 29--(Continued)

Name—YAKIMA NATIONAL BANK

Address

Dealer A
Interest Rate.....%

Old Balance	Date	Bought or Received	Sold or Delivered	Items	Interest as of	Price	Charges	Credits	Balance*	Date
00	July 14		2000	British Funding Lim Kingdom 4 60.....		102		10,276.75		
				Int Chg Adv of Funds 2M British F.....			51.38			
				Ck			10,225.37		00*	14
	1936									
	Jan 6									
As of 12/27/35			50	Sunshine Mining Capital Stock.....		23¼		1,147.62		
6				50¢ Per Share on 2000 Sunshine Min Payable 12/30/35....				1,000.00		
As of 12/30/35										
6				Check						
As of 1/2/36				Check			1,147.62		1,000.00*	6
1,000.00				Check			1,000.00		00*	7
00	21			Check			2,152.95			
As of 1/15			100	Sunshine Mining Capital Stock.....				2,152.95	00*	21
00	27		200	Commonwealth & Southern Common.....		4¼		790.68	790.68*	27
790.68	Feb 3			Check			790.68		00*	3
00	6		100	Sunshine Mining Common.....		21⅞		2,165.45	2,165.45*	6
2,165.45	11			Check			2,165.45		00*	11
00	14		100	Sunshine Mining Capital Stock.....		21¾		2,152.95	2,152.95*	14
2,152.95	18			Check			2,152.95			
			100	Sunshine Mining Capital Stock.....		21		2,078.10		
			100	Same		21		2,077.95		
			100	Same		21¼		2,090.60		
			100	Same		21¼		2,090.45		
			100	Same		21¼		2,090.60		
			100	Same		21¼		2,090.45	12,518.15*	18
12,518.15	20			Check			12,518.15		00*	20
00	25		100	Sunshine Mining Co. Capital Stock.....		20¼		1,990.60		
			100	Same		20¼		2,003.10		
5,984.15	26		100	Same		20¼		1,990.45	5,984.15*	25
			100	Same		20		1,978.11		
			200	Same		20		3,956.27		
			100	Same		20		1,978.11	13,896.64*	26
13,896.64	27			Check			5,984.15		7,912.49*	27
7,912.49	28			Check			7,912.49		00*	28
00	Mar 24 '36		100	Sunshine Mining Cap Stock.....		19¾		1,954.12	1,954.12(R)	
1,954.12	Mar 25 '36		100	Same		19¼		1,904.12	3,858.24(R)	
3,858.24	Mar 27 '36			Check			3,858.24		00*	
00	31			.50 Per Share Dividend on 400 Sunsh Common.....			200.00		200.00*	

Balance Forward

[373]

[Printer's Note]: Figures in italics typed in red.

Plaintiff's Exhibit 29—(Continued)

Name—YAKIMA FIRE NATIONAL BANK

Address

Dealer
Interest Rate.....% B

Old Balance	Date	Bought or Received	Sold or Delivered	Items	Interest as of	Price	Charges	Credits	Balance*	Date
200.00	Apr 3			Check			200.00			
			200	Sunshine Mining Capital Stock.....		19 1/4		3,808.28	3,808.28*	3
3,808.28	7			Check			3,808.28		00*	7

[374]

PLAINTIFF'S EXHIBIT No. 30

District Office Yakima Wn
April 16 1935

Drumheller, Ehrlichman & White
501 Exchange Building
Seattle, Washington

Enclosed Are Securities Received by This Office Today:

Shares or Par	Description	Name of Account	Security Numbers	In Name of
2500	Sunshine Mining	YK 1st Natl	WN 2038 to 2062 inclu.	
Signed—SPENCER				

District Office Yakima Wn
April 24 1935

Drumheller, Ehrlichman & White
501 Exchange Building
Seattle, Washington

Enclosed Are Securities Received by This Office Today:

Shares or Par	Description	Name of Account	Security Numbers	In Name of
5M 100	Sunshine Mng “ “	YK 1st Natl J P Anderson	2105 to 2154 inclusive WN 1076	John P or Etta Copper Anderson
300	“ “	L. Sanford	WN 2155	E M Poccock
1M	Missouri Pac Ry 4/75	YK 1st Nat'l	M 9789	
1M	“ “ 5/77	“ “ “	85611	
5M	New Orleans Tex & Mex	“ “ “	M 863 to 867 inc	
5M	“ “ “	“ “ “	M 3705 to 3709 inc	
5M	YK Water Rev 'A' 5/51	1st Nat'l Toppenish	86-88-90 92-94	

Signed.....

[375]

District Office Yakima Wn
April 25 1935

Drumheller, Ehrlichman & White
501 Exchange Building
Seattle, Washington

Enclosed Are Securities Received by This Office Today:

Shares or Par	Description	Name of Account	Security Numbers	In Name of
{ 1M Home 2 $\frac{3}{4}$ \$500 \$ 50 \$ 25 \$100 \$100 \$ 25 5M	do	1st Nat Topp.	M32086F	Edw. M. Pocock
	do	do	X14975E	
	do	do	R15040L	
	do	do	P15993C	
	do	do	T677126F	
	do	do	T218088J	
	do	do	P196003C	
Sunshine Mining		Yk. 1st Nat Bnk.	No's WN 2159 to 2208 INC.	
100	Pacific Amn. Fisheries,	Jas E Trygstad	SFC 4524	
15	Incorporated Investors,	Eliz. Cunningham,	258179-97760-258323-175326	
6 38/40	do	Randolph Cunningham	97761-258182-285327	
			5038-5046,	

April 25 1935
(Continued)

Shares or Par	Description	Name of Account	Security Numbers	In Name of
1M	Bflo Roch and Pitts Ry. 4 1/2/57	Yk First Natl.	14654	
10M	Denver & Rio Grande RR, 4/36	do	32482-13282-12991	
			12984-12732-9339-9011	
			3939-13329-22359	
10M	Associated Tel. Util Co., 5 1/2/44	do	22551 to 22560 Inc.	
10M	Erie RR, 4/96	do	2192-3048-13295-16390-18201	
			18398-29368-31372-32555-35134	
5M	Missouri Pac. (F) 5/77	do	85612- to 85616 Inc.	
10M	Great Northern (D) 4 1/2 76,	do	13064 to 13073 INC	
10M	Balto and Ohio (D) 5-2,000	do	657,656,17786-24168-24167-24165-	
			24166-16200-23566-24164-	
10M	Southern Ry. 5/94	do	85328 to 85337 Inc.	
10M	Erie RR 5/75	do	M45202- to M45211 Inc	

Signed—SPENCER

[376]

PLAINTIFF'S EXHIBIT No. 32

Journal Copy

CUSTOMER'S SALE

Sold to		384		Date—April 23, 1935			
As Agent							
Quantity	Description	Price	Amount	Interest	Com.	Tax	Total
1,300 Shs	Sunshine Mining Company	16½	21,450.00	Pierce	162.50	39.24	21,182.80
	Capital Stock	Less Registration		D.E.W.	65.00		
		Fee under S.E.A. .46					
					<u>227.50</u>		
Customer		Debit					
	Yakima First National Bank	Inventory					
	Yakima, Washington	Brokerage					
		Transaction					
Paid by above		Stamps by E. A. Pierce & Co.					

Plaintiff's Exhibit No. 32—(Continued)

Journal Copy

CUSTOMER'S SALE

Sold to
As Agent
(E. A. Pierce & Co.)

383
Date—April 23, 1935

Quantity	Description	Price	Amount	Interest	Com.	Tax	Total
500 Shs	Sunshine Mining Company, Capital Stock	16½ Less Registration Fee under S.E.A. .17	8,250.00	Pierce D.E.W.	62.50 25.00	15.04	8,147.29
				Debit		87.50	
Customer				Inventory			
Yakima First National Bank				Brokerage			
Yakima, Washington				Transaction			

Paid by above Stamps by E. A. Pierce & Co.

Journal Copy

CUSTOMER'S SALE

Sold to
As Agent

382

Date—April 23, 1935

Quantity	Description	Price	Amount	Interest	Com.	Tax	Total
100 Shs	Sunshine Mining Company, Capital Stock	16¾ Less Registration Fee under S.E.A. .04	1,675.00	Pierce D.E.W.	12.50 5.00	3.04	1,654.42
					<hr/>		
					17.50		

Customer

Yakima First National Bank
Yakima, Washington

Debit

Inventory
Brokerage
Transaction

Paid by above

Stamps by E. A. Pierce & Co.

[377]

Plaintiff's Exhibit No. 32—(Continued)

Journal Copy

CUSTOMER'S SALE

Sold to As Agent		381 Date—April 23, 1935					
Quantity	Description	Price	Amount	Interest	Com.	Tax	Total
1,500 Shs	Sunshine Mining Company	16¾	25,125.00	Pierce	187.50		
	Capital Stock	Less Registration Fee under S.E.A. .53		D.E.W.	75.00	45.20	24,816.77
Customer					<hr/>		
	Yakima First National Bank Yakima, Washington			Debit	262.50		
				Inventory			
				Brokerage			
				Transaction			
Paid by above							
							Stamps by E. A. Pierce & Co.

Journal Copy

CUSTOMER'S SALE

Sold to As Agent		Date—April 23, 1935		380			
Quantity	Description	Price	Amount	Interest	Com.	Tax	Total
600 Shs	Sunshine Mining Company, Capital Stock	16 $\frac{5}{8}$ Less Registration Fee under S.E.A. .22	9,975.00	Pierce D.E.W.	75.00 30.00	18.16	9,851.62
Customer				Debit			
Yakima First National Bank				Inventory			
Yakima, Washington				Brokerage			
				Transaction			
						105.00	
						Paid by above	
						Stamps by E. A. Pierce & Co.	

Plaintiff's Exhibit No. 32—(Continued)

Journal Copy

CUSTOMER'S SALE

Sold to
As Agent

424

Date—April 24, 1935

Quantity	Description	Price	Amount	Interest	Com.	Tax	Total
100 Shs	Sunshine Mining Company, Capital Stock	17.55	1,755.00		17.50	.04	1,737.46

Customer

Yakima First National Bank
Yakima, Washington

Debit

Inventory
Brokerage
Transaction

Tax .04 Paid by above Stamps by Drumheller,
Ehrlichman & White
[378]

Journal Copy

CUSTOMER'S SALE

425
Date—April 24, 1935

Sold to
As Agent

Quantity	Description	Price	Amount	Interest	Com.	Tax	Total
100 Shs	Sunshine Mining Company, Capital Stock	17½	1,750.00		17.50	.04	1,732.46

Customer

Yakima First National Bank
Yakima, Washington

Debit
Inventory
Brokerage
Transaction

Tax .04 Paid by above Stamps by Drumheller,
Ehrlichman & White

Plaintiff's Exhibit No. 32—(Continued)

Journal Copy

CUSTOMER'S SALE

Sold to		426		Date—April 24, 1935					
As Agent									
Quantity	Description	Price	Amount	Interest	Com.	Tax	Total		
1,000 Shs	Sunshine Mining Company,	17	17,000.00	Pierce	125.00				
	Capital Stock	Less Registration Fee under S.E.A. .35		D.E.W.	50.00	30.12	16,794.53		
Customer									
Yakima First National Bank				Debit					
Yakima, Washington				Inventory					
				Brokerage					
				Transaction					
Paid by above								Stamps by E. A. Pierce & Co.	

Journal Copy

CUSTOMER'S SALE

Sold to As Agent		Date—April 24, 1935				427
Quantity	Description	Price	Amount	Interest	Com.	Tax Total
500 Shs	Sunshine Mining Company, Capital Stock	17½ Less Registration Fee under S.E.A. .18	8,750.00	Pierce D.E.W.	62.50 25.00	8,647.28
Customer				Debit		
Yakima First National Bank				Inventory		
Yakima, Washington				Brokerage Transaction		
				87.50		
				Paid by above		Stamps by E. A. Pierce & Co.
						[379]

Plaintiff's Exhibit No. 32—(Continued)

Journal Copy

CUSTOMER'S SALE

Sold to		428		Date—April 24, 1935			
As Agent							
Quantity	Description	Price	Amount	Interest	Com.	Tax	Total
500 Shs	Sunshine Mining Company,	171½	8,750.00	Pierce	62.50		
	Capital Stock	Less Registration		D.E.W.	25.00	15.20	8,647.10
		Fee under S.E.A. .20					
Customer					87.50		
	Yakima First National Bank			Debit			
	Yakima, Washington			Inventory			
				Brokerage			
				Transaction			
Paid by above						Stamps by E. A. Pierce & Co.	

Journal Copy

CUSTOMER'S SALE

Sold to
As Agent

485
Date—April 25, 1935

Quantity	Description	Price	Amount	Interest	Com.	Tax	Total
1,000 Shs	Sunshine Mining Company, Capital Stock	19½	19,500.00 .40	Pierce D.E.W.	125.00 50.00	30.16	19,294.44
					<hr/>		
					175.00		
					Debit		
					Inventory		
					Brokerage		
					Transaction		

Customer

Yakima First National Bank
Yakima, Washington

Paid by above

Stamps by E. A. Pierce. & Co.

Plaintiff's Exhibit No. 32—(Continued)

Journal Copy

CUSTOMER'S SALE

Sold to		486		Date—April 25, 1935		Total	
As Agent						Tax	
Quantity	Description	Price	Amount	Interest	Com.		
400 Shs	Sunshine Mining Company,	19 $\frac{3}{4}$	7,900.00	Pierce	50.00		
	Capital Stock		.16	D.E.W.	20.00		
						7,817.80	
						<hr/>	
						70.00	
Customer				Debit			
Yakima First National Bank				Inventory			
Yakima, Washington				Brokerage			
				Transaction			
				Paid by above		Stamps by E. A. Pierce & Co.	
						[380]	

Journal Copy

CUSTOMER'S SALE

Sold to
As Agent

489
Date--April 25, 1935

Quantity	Description	Price	Amount	Interest	Com.	Tax	Total
300 Shs	Sunshine Mining Company, Capital Stock	19	5,700.00	Pierce D.E.W.	37.50 15.00	9.04	5,638.34

Paid by above Stamps by E. A. Pierce & Co.

Journal Copy

CUSTOMER'S SALE

Sold to

As Agent

488

Date—April 25, 1935

Quantity	Description	Price	Amount	Interest	Com.	Tax	Total
300 Shs.	Sunshine Mining Company,	19 $\frac{1}{4}$	5,775.00	Pierce	37.50		
			.12	D.E.W.	15.00	9.04	5,713.34
<hr/>							
Capital Stock					52.50		
Customer				Debit			
Yakima First National Bank				Inventory			
Yakima, Washington				Brokerage			
				Transaction			

Paid by above

Stamps by E. A. Pierce & Co.

[381]

Plaintiff's Exhibit No. 32—(Continued)

Journal Copy

CUSTOMER'S SALE

Sold to		487		Date—April 25, 1935			
As Agent							
Quantity	Description	Price	Amount	Interest	Com.	Tax	Total
600 Shs	Sunshine Mining Company,	193/4	11,850.00	Pierce	75.00	18.12	11,726.64
			.24	D.E.W.	30.00		
Capital Stock							
Customer					105.00		
	Yakima First National Bank			Debit			
	Yakima, Washington			Inventory			
				Brokerage			
				Transaction			
Paid by above				Stamps by E. A. Pierce & Co.			

Journal Copy

CUSTOMER'S SALE

Sold to
As Agent

526

Date—April 26, 1935

Quantity	Description	Price	Amount	Interest	Com.	Tax	Total
500 Shs	Sunshine Mining Company,	23	11,500.00	Pierce	62.50		
			.23	D.E.W.	25.00	20.05	11,392.22
Capital Stock							
Customer							
	Yakima First National Bank			Debit	87.50		
	Yakima, Washington			Inventory			
				Brokerage			
				Transaction			

Paid by above Stamps by E. A. Pierce & Co.

PLAINTIFF'S EXHIBIT No. 33

Sheet No.....		Credit Limit		Name Notes Payable		Account No.....	
Rating Business				Address			
Date	Items	Fol.	Debits	Credits	CR Balance		
1930							
Mar 21	Old Natl Bank & Union T. Co.....	90	da Loan 6% Int Prepaid	100000.00	160000.00		
	Yakima First Natl Bank.....	90	da Loan 6%.....	60000.00	30000.00		
Apr 4	Yakima Invest Corp'n.....	90	da Loan 6%.....		150000.00		
	Yakima First Natl Bank.....		Payt on Loan	40000.00	100000.00		
15	First Seattle D. H. Natl Bank.....	90	da Loan 6% Int Prepaid		230000.00		
16	Yakima First Natl Bank.....		Bal Loan Paid in Full.....	20000.00	220000.00		
June 17	Old Natl Bank & Union T. Co.....		Payt on Note-Bal Renewed	10000.00	200000.00		
July 8	First Seattle D. H. Natl. Bank.....		Payt on Note.....	20000.00	193500.00		
Sept 17	Old Natl Bank & Union T. Co.....		Payt on Note-Bal Renewed	15000.00			
	Yakima Invest Corp'n.....	90	da Loan 6%.....	8500.00			
1931							
Jan 10	Notes paid in Full.....		193500.00		25000.00		
12	Yakima First Natl Bank.....	90	da Note 6%.....	25000.00	20000.00		
Feb 11	" " " ".....		Payt on Note.....	5000.00	15000.00		
14	" " " ".....		Payt on Note.....	5000.00	19000.00		
May 27	" " " ".....		90 day Note 6%.....	40000.00			

Plaintiff's Exhibit No. 33—(Continued)

Sheet No.....	Account No.....	Credit Limit		Name	Notes Payable	CR	
Rating	Business	Items	Fol.	Address		Credits	Balance
Date							
Aug 25		Yakima First Natl Bank.....	Payt on Note.....		1500.00		17500.00
Sept 22		" " " " " " " " " " " "	90 Day Note 6%.....			10000.00	27500.00
Dec 10		" " " " " " " " " " " "	90 Day Note 6%.....			12500.00	40000.00
12		" " " " " " " " " " " "	90 Day Note 6%.....			2500.00	42500.00
22		" " " " " " " " " " " "	90 Day Note 6%.....			7500.00	50000.00
31		" " " " " " " " " " " "	Notes Paid in Full.....		50000.00		.....
1932							
Jan 11		" " " " " " " " " " " "	90 Day Note 6% Int Prepaid			50000.00	
12		" " " " " " " " " " " "	90 " " 6% " " " "			5000.00	55000.00
Feb 8		" " " " " " " " " " " "	90 " " 6% " " " "			2000.00	57000.00
Mar 22		" " " " " " " " " " " "	90 " " 6% " " " "			5000.00	62000.00
25		" " " " " " " " " " " "	Note Pd in Full.....		2000		
		Guaranty Trust Co.....	Demand Note			2000.00	62000.00
Apr 11		" " " " " " " " " " " "	Demand Note			1000.00	63000.00
15		" " " " " " " " " " " "	Notes Paid in Full.....		3000.00		60000.00

Forwarded

Plaintiff's Exhibit No. 33—(Continued)

Account No.....			Sheet No.....		
Name		Notes Payable	Rating	Credit Limit	
Address			Business		
Date	Items	Fol.	Debits	Credits	CR Balance
1932					
Dec 3	Guaranty Trust Co.....	Loan Advance			60000.00
23	“ “ “	Loan Advance		600.00	60600.00
31	“ “ “	Loan Advance		100.00	60700.00
	Transf to Accts Payable Acet..	CRJ 30	700.00		60000.00
1933					
Jan 10	Guaranty Trust Co.....	Demand Note Dated 1/10		1000.00	61000.00
May 29	“ “ “	Demand Note Paid.....	1000.00		
	Yakima Securities Co.....	90 Da Note Dated 5/29/33		7000.00	67000.00
July 6	Guaranty Trust Co.....	Note		500.00	67500.00
13	Pd Direct from G. T. Co.				
	Trust a/c.....		200.00		
Aug 4	Pd Direct from G. T. Co.				
	Trust a/c.....		200.00		

Plaintiff's Exhibit No. 33—(Continued)

Account No.....		Sheet No.....	
Date	Name	Notes Payable	Rating
	Address		Credit Limit
		Business	
		Fol.	
	Items	Debits	Credits
			CR
			Balance
Jan 23	Yak. Sec. Co.	Note in Full.....	100.00
	YFNB	Payt on Notes.....	7000.00
May 4	"	Note.....	6000.00
Dec 17	"	Note Paid.....	5000.00
1935			59000.00
June 7	"	Note Paid.....	50000.00
	G T Co Alex Miller.....	Note.....	10000.00
	"	Note.....	50000.00
	"	Note Paid.....	110000.00
Sept 17	Natl Bank of Commerce.....	Note Paid YFNB Notes.....	
			60000.00

[385]

DEFENDANT'S EXHIBIT A

Drumheller, Ehrlichman & White

No. 6545

Yakima Washington Apl 25 1935

Received YK 1st Natl

5M Sunshine Mng #424

\$.....

Drumheller, Ehrlichman & White

By SPENCER

Drumheller, Ehrlichman & White

No. 6519

Yakima Washington Apl 16 1935

Received Yk 1st Natl BK

1000 Sunshine Mng WN 226

800 " " WN 259

700 " " WN 334

2500 total

\$.....

Yakima Holding
Corp.

Drumheller, Ehrlichman & White

By SPENCER

Drumheller, Ehrlichman & White

No. 6530

Yakima Washington Apl 23 1935

Received YK 1st Natl

5M Sunshine Mng WN 69

Drumheller, Ehrlichman & White

By SPENCER

DEFENDANT'S EXHIBIT B

Save Your Receipts

No. 5682

Yakima, Washington, 4-16 1935

Received of Yakima Holding Corp.

Stock Certif Sunshine Mining Cmp Dollars \$.....

#WN 334 700 shares

WN 259 800 shares

WN 226 1000 shares

YAKIMA FIRST NATIONAL BANK

By FVG.

Check

Draft

Money Order For delivery to

Cash Drumheller Ehrlichman & White

Jour.....

Save Your Receipts

No. 5702

Yakima, Washington, 4/ 1935

Received of Yakima Holding Corp.

Certificate of Stock Dollars \$5000.00

#WN 697 5000 shares

for sale thru Drumheller

Ehrlichman & W

YAKIMA FIRST NATIONAL BANK

By F V GLAETZNER

Check

Draft

Money Order

Cash

Jour.....

DEFENDANT'S EXHIBIT C

Sheet No.....	Credit Limit	Name—Yakima Holding Corp. Stock Invest.	Account No.....
Rating	Business	Address—	
Date	Items	Fol.	Debits
1935			Credits
May 1	Pur. from First Sec & Loan Co. 1119 sh Y. H. Corp	CDJ 21	16785.00
1	Sold to Alex Miller.....1119 sh Y. H. Corp	CRJ 39	16785.00
			DR Balance
		
			[388]

DEFENDANT'S EXHIBIT D

		Check No.	Cash Disbursements	CR Y. F. N. Bank	DR General	DR Expense	DR Employees Insurance	DR Y. H. Corp Stock (Invest)	DR Reserve for Stock Adjust
1935									
Jan	17	U. S. Gov't Tax on Cks for Dec.....	.....	.12		.12			
		Yak. Daily Republic Pub. Report of Condition.....	369	5.04	5.16	5.04			
				5.16		5.16			
Feb	1	Met. Life Ins Co. Prem for Feb 1934.....	370	118.56			118.56		
		G. T. Co. Int on R. E. Cont to 1-1-35.....	1	975.00	1093.56	975.00			
				1093.56		975.00	118.56		
	8	Republic Pub. Co. Printing Financial Statements.....	2	9.70	9.70	9.70			
				9.70		9.70			
12		Western Union Telegram to S. F. 1-7-35.....	3	1.54	1.54	1.54			
				1.54		1.54			
15		Hull-Miller Co. Liability on Old GTCoBldg.....	4	31.05	31.05	31.05			
				31.05		31.05			
Mar	11	Met. Life Ins. Co. Prem for Mar. 1935.....	5	118.56	118.56		118.56		
				118.56			118.56		
15		Treas Yak. County 1934 Taxes L12B30—1079.70 Less 3% Rebate 32.39							
			6	1047.31	1047.31	1047.31			
				1047.31		1047.31			
29		Y. F. N. B. Int on Note.....	7	750.00	750.00	750.00			
				750.00		750.00			
30		F. B. Wilkins, P. M. Revenue Stamps.....	8	25.00	25.00	25.00			
				25.00		25.00			
Apr	2	Met. Life Ins. Co. Prem for Apr. 1935.....	9	118.56	118.56		118.56		
				118.56			118.56		
23		Guaranty Trust Co. Payt on R. E. Cont.....	380	2500.00	2500.00	2500.00 R.E.			
				2500.00		2500.00			
May	1	First Sec. & Loan Co. Payt Reserve a/c in Full.....	383	78000.00					78000.00
		First Sec. & Loan Co. Purchase Yak. Holding Corp. Stock as follows:	384	16785.00				16785.00	

[389]

Cert. #314 First Sec & Loan Co.....	900	Sh.
327 E. J. Lemke.....	33	“
340 E. H. Powell.....	40	“
341 Wash. Nursery Co.....	133	“
370 Katherine E. Van Slyke	13	“

 1119 Sh.

(1119 Sh @ \$15.00=16785.00)

94785.00

94785.00

16785.00

78000.00

[390]

[Title of District Court and Cause.]

DETAILED OPINION OF THE COURT
ON THE FACTS

Cheney & Hutcheson,
Miller Building, Yakima, Wash.
Attorneys for Plaintiff

Lyle Keith,
United States Attorney, Spokane, Wash.

Harvey Ericksen,
Assistant United States Attorney,
Spokane, Wash.

Thomas R. Winter,
Special Assistant to the Chief Counsel, Bureau
of Internal Revenue, Seattle, Wash.
Attorneys for Defendant

Schwellenbach, District Judge.

In this action plaintiff is suing as liquidating trustee of Yakima Holding Corporation (hereafter called the Holding Company) to recover \$26,933.86 which defendants' Commissioner of Internal Revenue collected for defendant on a deficiency assessment on the Holding Company's 1935 income tax which deficiency assessment included 50% fraud penalty and interest to the date of payment. Plaintiff also seeks to recover the interest on the amount that it paid from the date of payment to the date of judgment. Plaintiff contends that the income upon which the assessment was levied was the income of the Yakima-First National Bank (hereafter called the Bank) and asserts that the Bank made a proper

return on such income but concedes that no tax was paid thereon for the reason that even with the inclusion of this income the Bank's operations during 1935 showed a net loss. During 1934 and 1935, the Holding Company was the owner of all of the capital stock, except directors qualifying shares of the plaintiff, [391] of the Bank and of the First National Bank of Wapato. The officers of all four corporations were practically identical. The majority of the directors were identical, as were also the executive committees of the corporations. The same attorney handled the legal business of all of them. R. M. Hardy was president of all corporations, George H. Bradshaw was secretary, Alex Miller was vice-president, L. R. Rightmire was treasurer, E. P. Hoffman was auditor. Until his death late in 1934, A. E. Larson was a director of each of the corporations. Prior to the trial of this action, Mr. Miller, Mr. Hoffman and Mr. Bradshaw died. In addition to that, Mr. Hardy was president of, and Messrs. Larson and Miller were substantially interested in, the Sunshine Mining Company (hereafter called Sunshine). The Bank had not recovered from the losses sustained during the depression of the preceding years and from 1930 on had problems similar to many other banks which resulted in insistence by the National Banking Department that it strengthen its financial position. The details concerning the Bank's position are not of importance here. It is sufficient to say that it is conceded that had the Bank's financial statement shown its assets at their true value, there would have resulted an

impairment of capital. During the time immediately preceding the transactions involved here, there occurred a phenomenal activity in the stock of Sunshine which pointed to the situation which later developed of a very rapid appreciation of the market value of Sunshine stock. In August, 1934, the Holding Company which was indebted to the Bank in the sum of \$60,000 and which, at that time, received \$75,000 in cash from Mr. Hardy, purchased 7,500 shares of stock of Sunshine. Of this, 2,500 shares were purchased on the open market and the certificate therefor taken in the name of the Holding Company's secretary George Bradshaw as a street name. Five Thousand shares were purchased from the Grande Stolle Company and taken in the name of the Bank. These items were shown on the Holding Company's books in a ledger account entitled "Sunshine Mining Co. Stock." These items amounted to \$59,575. [392] On the same dates, entries were made in the Holding Company's cash disbursements journal by which the Holding Company's Bank account was credited with \$59,575 and a new debit account was opened on the journal entitled "Sunshine Mining Co. Stock," in which the debit item of \$59,575 was entered. Dividends upon this stock between August 17, 1934, and April, 1935, consisted of a 20% dividend received on April 4, 1935, and those dividends in the amount of \$1,500 were paid to and retained by the Holding Company. The entries in the Holding Company's ledger setting forth the purchase of the 7,500 shares of stock have as specifically designated items on the ledger

page the initials YFNB for the description of the number of shares and the price paid for each share. An examination of other sheets of the Holding Company's ledger concerning assets owned by the Holding Company show that almost without exception similar designations were placed in front of descriptions of property, the title to which was concededly in the Holding Company. On the same page of the ledger, under date of January 6, 1935, there appears an item "To write up value of 25c per share as of 12/31/34 \$1,875." This same entry shows that this \$1,875 item was entered in the cash receipts journal of the Holding Company on p. 38 on the same date. Just how this was done or why it was done is not the subject of proof or explanation in the testimony.

On December 11, 1934, the Holding Company wrote to Alex Miller offering to exchange 4,000 shares of the Holding Company's stock for 5,000 shares of Sunshine stock. This was on the basis of the value of \$15 per share for the Holding Company stock and \$12 per share for the Sunshine stock. By letter of December 11, 1934, Miller accepted this offer and on the same date he deposited with the plaintiff as a trust company his certificate for 5,000 shares of the Sunshine stock authorizing the plaintiff to deliver it to the Holding Company in exchange for 4,000 shares of the Holding Company's stock making this proviso: "I wish, however, to make it a condition that this exchange will not be completed unless a sum sufficient to make the new total to be provided for the Yakima Holding Com-

pany equals the sum of at least \$200,000 and to be completed by March 1, 1935." The oral testimony is [393] that the above proviso was waived by Mr. Miller and that he consented that the plaintiff might make the deal without the compliance with the provisions of the December eleventh letter.

There was also introduced in evidence a letter dated December 12, 1934, from the Holding Company by Geo. H. Bradshaw, Secretary, to the Bank which reads as follows:

"In order to confirm an understanding we have had with the bank regarding the purchase of 7500 shares of Sunshine Mining Company stock, I thought it advisable to write this letter. It was understood that this stock was to be purchased by the Yakima Holding Corporation and held by it for the account of the bank. The Yakima Holding Corporation was to be reimbursed for the amount actually paid for the stock, plus a small appreciation to be determined at the end of the year if this should be deemed necessary. We, therefore, treated this stock as being held for the bank, and if any loss results it is to be the loss of the bank and, of course, if any profit results it will likewise *accure* to the bank.

"I am taking this opportunity also of setting out the understanding reached in connection with the proposal submitted by us to Mr. Alexander Miller to exchange 4000 shares of stock of the Yakima Holding Corporation for 5000 shares of stock of the Sunshine Mining Com-

pany. We are doing this on the express understanding that stock of the Sunshine Mining Company will be taken over by the bank at the stipulated price of \$12.00 per share. This understanding is to apply to any further similar transactions.

“I would ask you to signify that this is also in accordance with your understanding of these transactions by signing the acknowledgment on the bottom of this letter.”

On the same sheet as the letter there was attached the following:

“The above represents the understanding that has been reached between the bank and the Yakima Holding Corporation with respect to the matters set out above and the same is hereby approved.

YAKIMA FIRST NATIONAL
BANK

By H. F. Crawford
Cashier”

The testimony was that Mr. Crawford was selected to sign the acceptance by the Bank for the reason that he was the one officer of the Bank who held no office in the Holding Company. The testimony of Mr. Hardy, [394] Mr. Rightmire and Mr. Crawford is that the foregoing letter and acceptance were written and signed on December 12, 1934, for the purpose of reducing to writing the understanding between the Holding Company and the Bank as to the two transactions. Each of the witnesses is a reputable citizen of Yakima. There was nothing

in the demeanor of any of these witnesses on the stand nor was anything elicited by the cross examination to deprecate the value of the testimony.

On January 7, 1935, a special meeting of the directors of the Holding Company was held. The minutes therefor indicate a general discussion but do not mention the transaction of December 12, 1934. On February 5, 1935, the annual meeting of the stockholders of the Holding Company was held. Thirty-eight stockholders were present in person holding 16,107 shares. The holders of 31,287 shares were present by proxy. The following financial statement was read to the stockholders:

“STATEMENT

January 7th, 1935

Assets

Cash in Bank	\$ 10,144.23
Notes Receivable	2,145.00

Stock Investments:

1519 Shares Guaranty	
Trust Co.	\$303,300.00
4837½ Shares Yakima	
First Natl. Bank	912,000.00
230 Shares First Natl.	
Bank, Wapato	52,267.50

1,267,567.50

Other Stock Investments	61,451.50	
Real Estate	69,000.00	\$1,410,308.23

Liabilities

Notes Payable	50,000.00	
Capital Account (Represented by		
64,072,812½ shares of No Par		
Value Stock issued)	1,281,456.25	
Undivided Profits	851.98	
Reserves	78,000.00	\$1,410,308.23”

There was also read to the stockholders the certificate to the Auditor which reads as follows:

“This is to certify that the assets and liabilities as reflected by the above statement have been examined, and that the amounts reported therein agree with the respective amounts as shown by the books and records of the corporation.

“The certificates of stock representing shares owned, as well as evidence of other assets, as indicated by the statement are on hand.” [395]

The minutes show that thereafter the following ensued:

“After reading the report, the Chairman reviewed conditions that had prevailed during the past year and commented on conditions as they appeared at this date, expressing the opinion that the institutions comprising the Holding Corporation were in good condition and had made good progress during the past year, but that the directors of the various institutions had considered it unwise to declare dividends, preferring to strengthen the financial position of the institutions against any possible further adverse conditions. He then invited the stockholders present to express their views on conditions and to ask any questions they saw fit regarding the Holding Corporation or its member institutions and in accordance with this invita-

tion the following stockholders participated in the general discussion: Mr. Van Amburg, W. A. Bell, E. E. Samson and Geo. E. Bradshaw, with some of the other stockholders asking questions regarding particular matters. It was then moved by Mr. Bell, seconded by Walter Tuesley that the financial statement and auditor's report be accepted and approved and be incorporated in the minutes of this meeting."

The testimony is that on April 12, 1935, the executive committee of the Holding Company held a meeting at which Messrs. Bradshaw, Hardy, Rightmire and Clift were present. The pertinent minutes of that meeting are as follows:

"Mr. Hardy stated there were several matters that required action by the executive committee and stated that the first matter was a proposal to Mr. Alex Miller to exchange 4000 shares of stock of the Yakima Holding Corporation for 5000 shares of Sunshine Mining Company stock on the basis of placing a value of \$15.00 per share on the stock of the Holding Corporation and \$12.00 per share on the stock of the Sunshine Mining Company. This proposal was made to Mr. Miller under date of December 11, 1934 and accepted by him. It was then moved by Mr. Clift, seconded by Mr. Rightmire, that we approve and ratify the proposal for the exchange of stock as outlined and authorize its completion. Carried.

“The secretary then stated that at the time this transaction with Mr. Miller was discussed by the officers an understanding was reached that if the transaction were completed that the Yakima First National Bank would take over from the Yakima Holding Corporation the 5000 shares of Sunshine at \$15.00 per share; also the 7500 shares of Sunshine stock already owned by the Yakima Holding Corporation at the cost price of same, all in accordance with a letter setting out this understanding dated December 12, 1934 from the secretary to the bank and approved by the bank.

“It was then moved by Mr. Rightmire, seconded by Mr. Clift, that the arrangement between the Holding Corporation and the bank as outlined by the secretary be approved and ratified, which motion being put was unanimously approved.” [396]

On April 16, 1935, the Bank gave to the Holding Company a receipt for certificates evidencing 2,500 shares of stock of Sunshine which read “For delivery to Drumheller, Ehrlichman and White.” On April, 1935, the bank executed to the Holding Company a receipt for 5,000 shares of Sunshine stock which read “For sale through Drumheller, Ehrlichman and White.” Drumheller, Ehrlichman and White was a Seattle stock brokerage concern with a branch office in Yakima. On April 16, 1935, the brokerage concern issued its receipt to the Bank for the same 2,500 shares on which receipt there

was a notation entitled "Yakima Holding Corporation." On April 23, 1935, the brokers issued to the Bank a receipt for 5,000 shares of Sunshine which was for the same shares for which the Bank had receipted to the Holding Company above described. Then, on April 25, 1935, the Drumheller firm gave the Bank a receipt for 5,000 Sunshine shares. The testimony shows that the Bank had and regularly maintained an account with this brokerage concern through which it sold stock for various of its customers. It is disclosed in the record that some 16,000 other shares of Sunshine stock were delivered by the Bank to this brokerage concern. In addition to that, the Drumheller firm bought and sold for and on behalf of the Bank's customers through this account with the Bank many other thousands of shares of stock of different corporations. It is the testimony of the plaintiff that of all of these shares of Sunshine and other corporations, these were the only items in the account in which the Bank was acting on its own behalf. It was also testified that the records of the brokerage house carried all purchases and sales in the name of the Bank and not in the name of the Bank's customers. Of the 12,500 shares of Sunshine stock delivered to Drumheller, Ehrlichman and White as above described, 11,000 shares were sold on the instructions of the Bank and the brokers paid to the Bank therefor a total of \$199,225.45. The remaining 1,500 shares were redelivered to the Bank. On the receipt of this amount, the Bank made out four cashier's checks, two of them dated April 30, 1935, to the

[397] Holding Company as payee; one of which was for \$61,451.50 and the other for \$60,000. The third check was dated April 30, 1935, and was in the amount of \$6,635.99, payable to the Holding Company or the Bank as payee. The fourth check was for \$71,137.96. It was dated May 1, 1935, and made out to the Bank as payee. The Holding Company deposited its checks in the Bank and the Bank transferred the money it received to its undivided profits account which entry was for \$77,773.95.

Thereupon entries concerning the transactions made upon the Holding Company's books were made by William Bradshaw, who kept the books of the Holding Company during the period involved. He made all entries concerning this transaction. Mr. Bradshaw was a young man who testified that he worked under his father who was George Bradshaw, Secretary of the Holding Company and who, he testified, died last year. This witness very definitely asserted that the manner in which all the entries were made by him was directed and controlled by his father. To understand these figures, it is necessary to go back to the entries made in August, 1934. It will be remembered that the original amount paid for the 7,500 shares of Sunshine stock was shown on the Holding Company's ledger as \$59,575. At the same time, there was made an entry of \$1.50 for transfer fees and on January 6, 1935, the entry of \$1,875 was made as to the write-up. These totaled \$61,451.50. There were no entries made on the books of the Holding Company concerning the Miller 5,000 share transaction until May 1,

1935, when this entire transaction was written up. On that day the following items appear upon the cash receipts journal:

“Yakima First National Bank
Sale of 7500 shares of stock Sunshine Mining
Co.\$61,451.50
Yakima First National Bank
Sale of 5000 shares stock Sunshine Mining
Co. at \$12.00 per share..... 60,000.00”

These, along with an item of \$13.20 which they had received from a man by the name of Keck, making a total of \$121,464.70 were debited against the Bank. Those portions of the entries which I have just described constitute the Holding Company's entry of the fact that it had deposited [398] this sum consisting of the three items in its account in the Bank. As to the 5,000 share Miller stock transaction, there was a further debit of \$60,000 with the notation, “Sunshine Mining Stock” just above it. Then, on the credit side of the journal, there was started a new account entitled “Sunshine Mining Co. Stock” on which a credit for \$61,451.00 was made opposite the entry in reference to the 7,500 share transaction and \$60,000 opposite the entry as to the 5,000 share transaction. Under the writing delineating the 5,000 share transaction, there appear the words “For explanation, see below.” Attention is called by an arrow to the following language: “Under letter Dated 12/11/34 Alex Miller agreed to exchange 5,000 shares stock Sunshine Mining Corp. at \$12 per share for 4,000 shares stock Yakima Holding Corp. at \$15 a share.”

There was introduced in evidence the Holding

Company's return for the year 1935 showing a net deficit of \$955.42. On that return, under the schedule entitled "Capital Gains and Losses", this item appears: "7500 shares Sunshine Mining Co., Kellogg, Idaho, Date acquired: August, 1934. Date sold: 5/1/35.

Gross sales price.....	\$61,451.50
Cost	59,576.50
Gain	1,875.00"

Under this item, in answer to the question, "State how property was acquired", the answer given was "Cash Purchase." On the same return, Schedule H, entitled "Income from Dividends" shows the following: "Sunshine Mining Co., Kellogg, Idaho, \$1500." The return of the Bank simply shows: "Profit, sale of Sunshine Mining Co. stock \$77,773.95." The testimony on behalf of the plaintiff was that this entire transaction was put through for the benefit of the Bank. It was admitted by the plaintiffs' witnesses that the Bank's record showed nothing concerning the transaction until it was entirely completed. Mr. Hardy testified that on various occasions the executive committee of the Bank passed upon the questions involved. No minutes of such meetings were kept nor were any entries made. In this Mr. Hardy was corroborated by Mr. Rightmire. It was the positive testimony of both of these witnesses that the Bank [399] was in difficulties and that the motive behind the transaction was to get sufficient profit out of the sale of the Sunshine stock to give to the Bank so as to be able

to save the Bank. The reason given for the method used in handling the transaction is that the parties realized the restrictions upon national banks in the purchase of stock in corporations. Both witnesses denied that the transaction was handled the way it was because they realized that the Bank might be less likely to be subject to an income tax than would the Holding Company. It was conceded in the testimony that the amount needed by the Bank to satisfy the requirements of the Banking Department was at least \$200,000. It was also admitted in the testimony that later that year arrangements were made with the National Bank of Commerce in Seattle to take over the Bank by purchasing its capital stock, which the Holding Company carried on its books as of a cost of \$913,000 for \$200,000. Mr. Hardy testified that the fact that the sales made of the stock involved in this case were made through Drumbheller, Ehrlichman and White by the Bank was proof that the Bank was the real owner of the stock for the reason that if the stock had been owned by the Holding Company it would have been sold through the plaintiff.

The Holding Company's Articles did not give it power to act as trustee. The by-laws authorized an executive committee which should function "during the intervals between the meetings of the Board of Trustees." They also provided that "All actions and things done by the Executive Committee shall be reported to the Board of Trustees at its meeting next succeeding such action, and shall be subject

to revision or alteration by the Board of Trustees." The by-laws further provided, "The Board of Trustees, in its discretion, may submit any contract or act for approval or ratification at any annual meeting of the stockholders, * * * and any contract or act shall be approved or ratified by the vote of the holders of a majority of the common stock of the corporation, which is represented in person or by proxy at such meeting, (provided that a lawful quorum of the stockholders be there represented either in person or by proxy) shall be as valid and binding upon the corporation and upon all the stockholders as though it had been [400] approved and ratified by every stockholder of the corporation."

It will be noted from the foregoing that certain of the facts have been secured from the minute book of the Holding Company from pages outside of that page upon which were written the minutes of April 18, 1935. I was uncertain from my notes just what disposition was made at the trial of the question as to how much of this minute book was put in evidence. Counsel will remember that there was considerable discussion back and forth between them upon that question. I had the court reporter read to me her notes upon this subject and I am still uncertain as to what was done. One or the other of the two following results occurred however: (1) the entire minute book was put in the record with the stipulation that the minutes of the meeting of April 12th constituted the only part of the minute

book that contained any information pertinent to this case or (2) only the minutes of April 12, 1935 were introduced in evidence. If this is so, it was with the assurance of counsel for the plaintiff that he had examined the minute book and assured the court that those particular minutes were the only ones which touched this subject. If the first statement covers the situation, then I am satisfied that I have the power to consider the entire minute book on the basis of *Utah & Northern Railway v. Fisher*, 116 U. S. 28; *California v. San Pablo & Tulare Railroad Company*, 149 U. S. 308; *Swift & Company v. Hocking Valley Railway Company*, 243 U. S. 281; *Sanford's Estate v. Commissioner*, 308 U. S. 39; and *Case et al. v. Los Angeles Products Co.*, 308 U. S. 106. If the second statement correctly outlines the situation, then I will expect that, if either side has any objection to me considering other portions of the minute book than that contained on the specific page, they will make proper objections thereto prior to the entry of the findings of fact and conclusions of law in which event I will reopen the case for the purpose of receiving in evidence the entire minute book. It seems to me that the other portions of the book to which I referred are very pertinent in the decision of this case. Particularly true is the fact that at the stockholders' meeting ownership of the 7,5000 shares was reported to the stockholders. [401]

There was further testimony about alleged conversations between Mr. Hardy and Mr. Rightmire upon the one side and Mr. Cook, of the National

Banking Department, upon the other. There was a sharp dispute in the testimony as between these gentlemen. After carefully weighing the testimony of the witnesses and considering it, I am convinced that the subject matter contained in such portions of the testimony added nothing to the final determination of this case. I am fully satisfied that I have a complete understanding as to what occurred and as to the reasons for the conflict in the evidence. It would be of no value to either side to have a more complete discussion of this phase of the testimony. I mention it here only that counsel may know that I have considered it and have concluded that there is no need for further consideration of that phase of the testimony.

FACTUAL CONCLUSIONS

1. I am convinced that this case involved two separate and distinct transactions. While it might be said that they were blended because of the fact that the stock which came from Miller was sold at approximately the same time as was the stock in the 7,500 share transaction, yet even then the checks issued by the Bank to the Holding Company were separately issued. The letter of December 12, 1934, referred to the two transactions separately, as did the minutes of April 12, 1935. The 7,500 share transaction was taken on the books of the Holding Company while the Miller transaction was not taken on the Holding Company's books until after it was completed. There is a very distinct difference be-

tween the method in which the transactions were handled.

2. As to the Miller transaction, the oral testimony is undisputed. This stock never actually got into the hands of the Holding Company. There is no written record made as to the Miller stock which might be said to contradict the oral record. [402]

3. As to the 7,500 share transaction, there is a definite conflict between the oral testimony and the written testimony. Mr. Hardy, Mr. Rightmire and Mr. Crawford were not impeached upon cross examination nor was there anything in their demeanor on the stand which would detract from the force of their testimony. However, the written record is clear. In every detail it leads to the conclusion that this stock was the property of the Holding Company. The purpose of the keeping of books of account by a corporation is that they may truly reflect the status of the transactions carried on by the corporation. No one familiar with corporate accounting practices could construe the many entries and writings in this case as meaning other than ownership. A bookkeeper just would not have written this up in this way had the stock been purchased for the account of the Bank. There is only one bit of writing in the whole case which supports the plaintiff's contention and that is the letter of December 12, 1934. Its evidentiary value, however, rests conclusively upon the oral testimony that it was written and signed on the date indicated.

Counsel for plaintiff points out in his brief that the legend at the bottom of the letter shows that it

was written by a stenographer whose last name began with "M" and that the Government subpoenaed somebody and had available a witness whose last name began with "M" assuming that it was the same person. If she was available to the Government, she was available to the plaintiff. She worked for the plaintiff. If her testimony would have supported the plaintiff's position, undoubtedly plaintiff's counsel would have called her. I give full weight to the testimony of Mr. Hardy and Mr. Rightmire and Mr. Crawford. Particularly, do I do this because I know Mr. Hardy and have great respect for his integrity. However, it is my task to weigh the evidence and, after putting the evidence [403] on both sides in the balance, I am convinced that the testimony in writing overwhelming outweighs the oral testimony and that I must conclude that this 7,500 shares of stock was the property of the Holding Company and was not held in trust for the Bank.

4. Keeping in mind the nature of the fraud necessary to sustain the fraud penalty in the tax case, I can see no testimony of fraud here. The fraud referred to is the fraud in making the return. The standard is whether, at the time the return is made, the taxpayer knew that it owed the tax and fraudulently failed to report it. A transaction may be entirely fraudulent (I am not saying that this one was) and still not support a fraud penalty. It did not appear to me from the argument of counsel for the defendant at the time of the trial or in the brief

that defendant was seriously urging now that this fraud penalty should be sustained.

April 2, 1942.

L. B. SCHWELLENBACH

United States District Judge

Copy to Attys. 4/3/42. A. A. L.

[Endorsed]: Filed Apr. 3, 1942. [404]

[Title of District Court and Cause.]

OPINION OF THE COURT

Cheney & Hutcheson,

Miller Building, Yakima, Wash.

Attorneys for Plaintiff.

Lyle Keith,

United States Attorney,

Spokane, Wash.

Harvey Erickson,

Assistant United States Attorney,

Spokane, Wash.

Thomas R. Winter,

Special Assistant to the Chief Counsel,

Bureau of Internal Revenue,

Seattle, Wash.

Attorneys for Defendant.

Schwellenbach, District Judge.

The Plaintiff, as liquidating trustee of Yakima Holding Corporation (hereafter called the Holding

Company), sues to recover \$26,933.86 which was the amount of a deficiency assessment with penalties collected from the Holding Company on its 1935 income. Plaintiff's theory is that the income upon which the assessment was levied was that of the Yakima First National Bank (hereafter called the Bank) which made the return on such income but which paid no tax thereon because of the net deficit resulting that year from the Bank's operations. Because of the complicated nature of the testimony and the many exhibits introduced, I am filing simultaneously with this opinion a detailed opinion concerning the facts. [405]

During 1934 and 1935, the Holding Company owned all of the capital stock of the plaintiff and of the Bank. In addition, the Holding Company had a \$52,000 investment in the First National Bank of Wapato and a \$69,000 investment in real estate. Its stock was widely held. The officers and directors of the three corporations were practically identical. All were dominated by R. M. Hardy and a small group of associates. Mr. Hardy was president of each of the corporations and he and two of the other directors, Larson and Miller, were substantially interested in the Sunshine Mining Company (hereafter called Sunshine). The oral testimony of plaintiff was submitted by Mr. Hardy, Mr. Rightmire, the treasurer of the corporations, and Mr. Crawford, the cashier of the Bank. Four of the men who actively participated in the transactions herein involved died between 1934 and the time of trial. The three witnesses who did testify

are highly reputable citizens of Yakima. The testimony was given in such a way as to merit consideration by the Court.

The Bank's capital was impaired and the Banking Department was insisting that certain of its assets be removed. Immediately preceding the transactions involved here, there occurred a phenomenal activity in the stock of Sunshine which later developed a rapid appreciation in its market value. In August, 1934, the Holding Company purchased 7500 shares of Sunshine. Of these, 2500 shares it placed in the name of its secretary and 5000 shares in the name of the Bank. These 7500 shares were carried on the books of the Holding Company as its property. It received the dividends on them. At the end of the year, it wrote up their value on its books. At the 1935 stockholders' meeting, the auditor's report to the stockholders showed the ownership of this stock by the Holding Company. The minutes of the executive committee of the Holding Company referred to this stock as "the 7500 shares of Sunshine stock already owned by the Yakima Holding Corporation." On its income tax return, it showed that the stock was acquired by "cash purchase." [406] When the stock was sold by the Bank through a brokerage house, the Bank gave the Holding Company its receipt for the stock. No one with the slightest familiarity with corporate accounting practices could conclude from the written evidence in this case other than that the Holding Company owned this stock.

On December 11, 1934, Mr. Alex Miller, who

was one of the dominating group in these corporations, by an exchange of letters arranged to trade 5000 shares of Sunshine for 4000 shares of the stock of the Holding Company. His stock was placed in escrow with the plaintiff pending the time that the Holding Company could pick up the necessary 4000 shares of its stock. Before that was done in April, 1935, all of the 12,500 shares of Sunshine stock were delivered to the Bank and by it delivered to a Seattle brokerage concern which sold 11,000 shares of the stock on the market and paid the Bank \$199,225, and returned to the Bank 1,500 shares which the Bank retained. The Bank thereupon issued to the Holding Company two checks—one for \$61,451.50, the amount at which the 7,500 shares of Sunshine stock then was carried on the Holding Company's books. The other check was for \$60,000, which was for 5,000 shares of Sunshine stock at \$12.00 per share. The balance of \$77,773.95 was retained by the Bank and put in its undivided profits account. Thereupon the Holding Company caused the necessary entries to be made upon its books. As regards the 5,000 shares acquired through the transaction with Alex Miller, these were the first entries made upon the Holding Company's books.

Plaintiff contends in this case, and its oral testimony supported that contention, that the whole transaction as to both groups of stock was for the benefit of the Bank. Plaintiff pleads and attempts to prove that the Holding Company's position in the transaction was merely that of Trustee. It ex-

plaintains that the transaction was thus handled because of the statutory restriction on stock ownership by national banks. (12 U. S. C. A. 24 (7)). Plaintiff introduced a letter dated December 12, 1934, which its witnesses testified was signed upon that date by the Holding Company and the Bank purporting to confirm an arrangement made in August, 1934, under which the Holding Company agreed to act as trustee for the [407] Bank and to handle this transaction for a compensation in the amount of dividends which might be paid by Sunshine on its 7,500 shares of stock and for a small write-up in the value of the stock in an amount to be agreed upon between the parties. The Commissioner found that the Holding Company was the owner of all of this stock and that the profits arising out of the sale were the Holding Company's profits which it directed into the Bank for the purpose of avoiding tax liability. He made a deficiency assessment with a fraud penalty.

At the threshold of this case I am met with strenuous argument as to the effect to be given to the presumption of correctness of the Commissioner's ruling. This is not a case in which anyone's thinking need be confused by getting involved in the many ramifications of that vexatious question. Tax cases deal with realities and not fine spun legalistic distinctions. *Moore v. Commissioner*, 124 F. 2d 991. Assuredly a presumption is not evidence and it carries no affirmative probative weight. *Ariasi v. Orient Ins. Co.*, 50 F. 2d 548. What we have here, however, is not what plaintiff characterizes as a mere

procedural device which will melt like snow when subjected to the heat of a scintilla of proof introduced by the adverse party. The complication arises from the use of the word presumption by defendant's counsel and in many courts' opinions. As Wigmore points out, (Wigmore on Evidence (3d Ed.) Sec. 2490) presumptions operate on specific fragments of the issue. Here the question involves the burden of proof as distinguished from the burden of going ahead with the evidence. Or, as Mr. Wigmore puts it, *Id.*, Sec. 2488, the burden of the risk of non-persuasion of the jury (or judge when he is the trier of the facts) as distinguished from the burden of going forward with evidence so as to satisfy the judge as to stay in court. The first burden never shifts since no fixed rule of law can be said to shift. *Id.*, Sec. 2489. In analyzing the nature of the first burden, there are specific rules for specific classes of cases resting for their ultimate basis upon broad reasons of experience and fairness. *Id.*, Sec. 2486. The specific rule in this class of cases is that persons situated as is the plaintiff who seek to recover tax money [408] paid to the Government on the basis of the Commissioner's ruling have the burden of submitting clear and convincing proof in support of their position in order to recover. *Pearce v. Commissioner*, Decided March 9, 1942,, U. S.; *Helvering v. Fitch*, 309 U. S. 149; *Welch v. Helvering*, 290 U. S. 111; *Wichwire v. Reinecke*, 275 U. S. 101.

Necessary to a consideration of this case but not conclusive in its result is a discussion of the purpose

and effect of Sec. 16, Chap. 29, the Act of June 16, 1933, 12 U.S.C.A. 24 (7), which reads:

“* * * * The business of dealing in investment securities by the association shall be limited to purchasing and selling such securities without recourse, solely upon the order, and for the account of, customers, and in no case for its own account, and the association shall not underwrite any issue of securities.

* * * * *

“Except as hereinafter provided or otherwise provided by law, nothing herein contained shall authorize the purchase by the association of any shares of stock of any corporation.” * * *

There is no serious difference between the parties in the opinion that since this law contains no positive prohibition against the purchase of corporate stocks by a National bank that a bank's contract to purchase stock is not illegal and void, but is *ultra vires* and voidable. *Lantry v. Wallace*, 182 U. S. 536; *First Nat. Bank v. Stewart*, 107 U. S. 676. That being true, plaintiff's contention that in this case “The Bank could not lose. If the price went up it could enforce the deal against the Holding Company. If it went down it could refuse to perform,” must be accepted as a correct statement of the legal consequences of the situation. This legal *cul de sac*, however, does not detract one whit from the conclusion that what was done here was in direct contravention with the public policy of the United States. A public policy deliberately declared by the Congress as the outgrowth of a financial dis-

aster visited upon stockholders of corporations and depositors of banks which had its roots in thousands of transactions paralleling this [409] one.

The close relationship between these corporations and the mutuality of their officers and the dominance of both by the same stockholders make necessary an understanding of the attitude of the Federal Courts on the effect of such relationships. Fortunately, that attitude has been stated with completeness and clarity by the Supreme Court in *Geddes v. Anaconda Mining Co.*, 254 U. S. 590. There the court, speaking through Mr. Justice Clarke, said :

“The relation of directors to corporations is of such a fiduciary nature that transactions between boards having common members are regarded as jealously by the law as are personal dealings between a director and his corporation, and where the fairness of such transactions is challenged the burden is upon those who would maintain them to show their entire fairness and where a sale is involved the full adequacy of the consideration. Especially is this true where a common director is dominating in influence or in character. This court has been consistently emphatic in the application of this rule, which, it has declared, is founded in soundest morality, and we now add in the soundest business policy. *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 588; *Thomas v. Brownville, Ft. Kearney & Pacific R. R. Co.*, 109 U. S. 522; *Wardell v.*

Railroad Co., 103 U. S. 651, 658; Corsicana National Bank v. Johnson, 251 U. S. 68, 90."

From this rule, there has been no deviation. It was approved and amplified in *Pepper v. Litton*, 308 U. S. 295. The healthfulness of the rule is undeniable.

The one problem in this case is to determine whether the Holding Company or the Bank had the power to dispose of the profit (or income) from the sale of this Sunshine stock. If the Holding Company was merely the trustee for the bank, its duty was to turn the profit over to the Bank and it had no power over it. But if the Holding Company was in truth the owner of the stock and its act in turning the profit over to the Bank resulted only from the exercise of power by the officers of the Bank through their positions with the Holding Company, this would in no way negative the tax responsibility of the Holding Company. The power to dispose of income from property is the equivalent of ownership of it and the exercise of the power to procure its payment to another is within [410] the reach of the tax law. *Harrison v. Schaffner*, 312 U. S. 579; *Helvering v. Horst*, 311 U. S. 112; *Helvering v. Eubank*, 311 U. S. 122; *Lucas v. Earl*, 281 U. S. 111. When plaintiff so vigorously resists the consideration of this line of cases on the ground that in them the taxpayer had complete dominion over the involved assets, it simply begs the question. That is what this case is about. As Mr. Justice Holmes indicated in *Lucas v. Earl*, *supra*, it is the court's task to ascertain

whether an effort is being made to attribute fruits "to a different tree from that on which they grew."

After hearing the evidence and studying the exhibits, I am firm in my conclusion that this case involves two separate and distinct transactions. While they later merged in that the stock was sold at approximately the same time and the profits from both were directed into the Bank, that does not detract from my conclusion that they must be considered separately. It is true that the oral testimony submitted by plaintiff's witnesses treats of both transactions in the same way. This oral testimony, however, cannot overcome the written record which was made at the time. As a consequence, I am treating the two transactions separately in this opinion.

I am convinced that the plaintiff has sustained its burden of proof as to the stock which was acquired from Alex Miller. As to that transaction, the oral evidence is not contradicted by anything in writing. There were no entries made upon the Holding Company's books until after the transaction was completed and they were set up in such a way as to be susceptible of either interpretation. The only written evidence which detracts from this conclusion is in the minutes of the Holding Company's executive committee which provided that the Bank would take over the Miller stock at \$15 a share instead of \$12 a share as it later did. I have decided to resolve that doubt in favor of the plaintiff and to conclude that the use of the figure 15 was an error in the minutes. Having

reached this conclusion, it follows that in so far as tax was levied on the profit accruing from the sale of the 3500 shares out of the Miller stock, the assessment was erroneous. [411]

An entirely different situation exists, however, as to the original 7,500 share transaction. As to this, the oral testimony of the plaintiff is completely negatived and overwhelmed by the written evidence in the case. Every stroke of the pen on the Holding Company's books of account points unerringly to the ownership of this stock by the Holding Company. It is inconceivable to me that, if the Holding Company was in fact merely the trustee, it would have written up the transaction in the way it did. It set up its ledger account in such a way as to indicate ownership. Its journal entries from beginning to end indicated ownership. Its receipt of the dividends was an indication of ownership. It made its entry as to the write-up as of December 31, 1934, showing appreciation of \$1875, instead of waiting till the sale was made. I never heard of an entry showing a year-end appreciation write-up being made by a trustee of stock. It reported ownership of this stock to its stockholders at their annual meeting. Even the minutes of the executive committee upon which plaintiff relies show this Sunshine stock to be "already owned by the Yakima Holding Corporation." There can be no disagreement between reasonable minds on the conclusion that plaintiff has utterly failed to sustain its burden of proof on this transaction.

Plaintiff's counsel argues that the court is forced either to accept plaintiff's oral testimony as controlling or to brand plaintiff's position as a deliberate hoax to avoid tax liability and plaintiff's witnesses as perjurers. Such a dilemma is not presented here. To test this proposition requires only a statement of the case with full acceptance of plaintiff's evidence. Plaintiff's testimony is that in August, 1934, the officers of the Holding Company, orally and informally, agreed with themselves as officers of the Bank that the Holding Company would take \$60,000 of its money (the fact that it may have borrowed the money made it no less the Holding Company's money) and use it to speculate in mining stock. (The fact that Sunshine stock went up does not make its purchase any less a speculation.) The agreement was that the [412] Holding Company should hold the stock as trustee for the Bank. (This, despite the fact that the Holding Company's charter did not authorize it to act as trustee and that it never acted as trustee in any other transaction.) The compensation the Holding Company was to receive for the use of this substantial part of its assets was to be the dividends which might be declared upon the mining stock while the Holding Company was holding it, plus a small write-up which might be allowed to the Holding Company if the joint officers deemed it advisable. It was agreed that any profits which might accrue upon the stock would be the profits of the Bank and that any losses upon the stock would be the losses of the Bank.

(But, as plaintiff's counsel points out in his brief, this portion of the agreement was void because, in so far as these gentlemen were acting for the Bank in this regard, their action being ultra vires and contrary to the public policy, no court would ever have enforced that provision of the contract.) This agreement was wholly informal. There was no meeting of the directors or the executive committee of either corporation. Thereupon, under the direction of the Secretary of the Holding Company, entries were made in the books of the Holding Company, in such a way as to offer conclusive proof in the event the Bank might later seek to repudiate the contract that the title to the stock was in the Holding Company as its owner and not as trustee. Thereafter, on December 12, 1934, the foregoing agreement was reduced to writing. That writing consisted of a letter signed by the Secretary of the Holding Company and accepted by the cashier of the Bank. (Giving to this letter its full value from an evidentiary point of view, clearly it added nothing to the legal consequences of the oral, informal agreement.) On January 7, 1935, the board of directors of the Holding Company met. No action was taken by them to ratify or confirm the August agreement. Indeed, on the same day under the direction of the Secretary of the Holding Company, entries were made upon the books of that corporation showing the \$1875 write-up in the [413] value of the Sunshine stock in such a way as to furnish further indubitable proof of the Holding Company's

ownership of the stock in the event the Bank should seek to repudiate the terms of its contract. Then, on February 5, 1935, at a stockholders meeting attended in person or by proxy by the holders of 47,394 shares of the Holding Company stock, the secretary read to the stockholders the auditor's report showing the investment by the corporation of \$61,451.50 in stock. (This is the same amount as Sunshine stock was carried on the books.) No statement was made to the stockholders concerning the contract which it is claimed had been entered into nor of the fact that there was an agreement with the Bank under which the Bank was legally entitled to get the profits which might accrue while the Holding Company would sustain the losses which might ensue. On April 12, 1935, for the first time the executive committee of the Holding Company took formal action ratifying the contract informally entered into in August of 1934. The testimony shows that during all of the period no action of any kind concerning the agreement was ever taken by the board of directors of the Bank or its executive committee or of its stockholders. The record does not disclose how many of such meetings were held but the court judicially knows that institutions of this type hold frequent meetings of the executive committee, monthly meetings of the board of directors, and annual meetings of the stockholders during the spring of the year.

In view of this record of accumulated transgressions against the most primitive corporate respon-

sibilities, can anyone assert where the title of this stock would have been adjudged had the issue been raised by the Holding Company stockholders had they known the facts? Only the veriest tyro in the law would make such an assertion on either side of the question with any degree of assuredness. The court must know which corporation had actual command over the property taxed. *Griffiths v. Commissioner*, 308 U. S. 355. The only command the Bank exercised arose from the mutuality of the corporate officers at which the court must look with an adverse eye. The court need not resolve [414] doubts nor speculate as to outcomes. *Pearce v. Commissioner*, *supra*. Without question, the showing made in the *Pearce* case was much stronger than plaintiff's showing here. Since the Supreme Court there held that the petitioner had failed to sustain her burden of showing doubts and uncertainties, I am bound here to hold that plaintiff has failed to sustain its burden of submitting clear and convincing proof.

Plaintiff is entitled to recover the amount paid on the fraud penalty. On this question, the burden rests with the defendant. The fraud meant in the statute is actual, intentional wrong-doing and the intent required is the specific purpose to evade the tax believed to be owed. *Griffiths v. Commissioner*, 50 F. 2d 782; *Duffin v. Lucas*, 55 F. 2d 786; *Mitchell v. Commissioner*, 118 F. 2d 308. The defendant submitted no testimony on this point but asks me to conclude from the transaction that plaintiff

must have had fraudulent intent at the time of making the return. Such a conclusion is not justified. After all, this income was reported. The report as to its receipt was made by the wrong company. While it may have been negligently made, that is not sufficient to support the conclusion of fraudulent intent. It does not lie within the court's power to change the penalties assessed. That is an administrative function. *Duffin v. Lucas*, *supra*.

Judgment will be entered in accordance with this opinion.

April 2, 1942.

L. B. SCHWELLENBACH,

United States District Judge.

Copy to Atty. Gen'l., West Pub. Co. & attys 4/3/42. A. A. L.

[Endorsed]: Filed Apr. 3, 1942. [415]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This cause having heretofore duly and regularly come on for trial before the court sitting without a jury, the plaintiff being represented by its officers and its attorneys, Cheney & Hutcheson, and the defendant being represented by its attorneys, Lyle Keith, Harvey Erickson, and Thomas R. Winter; and the court having heard the evidence introduced

by each of the parties, and all parties having rested, and the court having heard the arguments of counsel and being duly advised in the premises, and the court having rendered and filed its written Detailed Opinion of the Court on the Facts and the written Opinion of the Court;

Now, Therefore, the court does hereby make the following

FINDINGS OF FACT

1.

That this court has jurisdiction of the subject matter of this action and of the parties herein under the provisions of the Tucker Act and the Internal Revenue Code of the United States as amended; and this action arises under the laws and statutes of the United States and particularly the statutes hereinabove mentioned.

2.

That at all times herein mentioned the plaintiff herein, Guaranty Trust Company, was and now is a corporation duly organized and existing under and by virtue of the laws of the State [416] of Washington, and engaged in transacting and duly authorized and qualified to transact a trust company business, and its principal place of business is situated in the city of Yakima, Yakima County, Washington, within this judicial district, and has paid all license fees due to the state of Washington.

3.

That at all times from 1930 until 1937 the Yakima Holding Corporation was a corporation duly organized and existing under and by virtue of the laws of the state of Washington, with its principal place of business at Yakima, Yakima County, Washington, in this judicial district. That said Yakima Holding Corporation was duly disincorporated and dissolved during the year 1937 pursuant to the laws and statutes of the State of Washington. That prior to said dissolution and on or about the 10th day of November, 1936, all of the assets, funds and property of every kind and character whatsoever of said Yakima Holding Corporation were duly transferred, assigned and conveyed to the plaintiff Guaranty Trust Company, as liquidating trustee, and at all times thereafter said Guaranty Trust Company has been and now is the duly appointed, qualified and acting liquidating trustee of the Yakima Holding Corporation.

4.

That during the year 1935 and for a number of years both prior and subsequent thereto Yakima First National Bank was a duly organized and existing national banking association engaged in transacting business at Yakima, Yakima County, Washington, as a national bank. During the years 1934 and 1935 said Yakima Holding Corporation (hereafter called "Holding Company") was a holding corporation owning practically all of the stock of said Yakima First National Bank (here-

after called the "Bank"), practically all of the stock of the First National Bank of Wapato, a national banking association located at Wapato, Yakima [417] County, Washington, and practically all of the stock of said Guaranty Trust Company, except directors' qualifying shares in each of the banks and the trust company.

5.

The officers of all four corporations were practically identical and the majority of the directors and members of the executive committees thereof were identical. All of the said corporations were dominated by R. M. Hardy and a small group of associates; R. M. Hardy was president of each of said corporations and was also president of Sunshine Mining Company (hereafter referred to as "Sunshine"), a prosperous mining corporation. During the time herein involved the Bank had not recovered from the losses sustained during the depression of the preceding years, and by reason thereof the capital of the Bank was impaired, and as a result thereof there was insistence by the National Banking Department that the Bank strengthen its financial position. During the time immediately preceding the transactions involved herein, there occurred a phenomenal activity in the stock of Sunshine which pointed to the situation which later developed of a very rapid substantial appreciation of the market value of Sunshine stock.

6.

In August, 1934, the Holding Company, which was then indebted to the bank in the sum of \$60,000.00, and which at that time received \$75,000.00 in cash from said R. M. Hardy, purchased 7500 shares of Sunshine stock, of which 5000 shares were taken in the name of the Bank and 2500 shares were taken in the name of George Bradshaw, who was the secretary of the Holding Company and also a director and member of the executive committee of the Bank, as a street name. The Holding Company paid the purchase price or cost of said 7500 shares of Sunshine stock in the sum of \$59,576.50. That on December 12, 1934, an agreement [418] was entered into between the Holding Company and the Bank, executed in the form of an accepted letter, as follows:

“Yakima Holding Corporation

Yakima, Washington

December 12, 1934

“Yakima First National Bank

Yakima, Washington

Gentlemen:

In order to confirm an understanding we have had with the bank regarding the purchase of 7500 shares of Sunshine Mining Company stock, I thought it advisable to write this letter. It was understood that this stock was to be purchased by the Yakima Holding Corporation and held by it for the account of the bank.

The Yakima Holding Corporation was to be reimbursed for the amount actually paid for the stock, plus a small appreciation to be determined at the end of the year if this should be deemed necessary. We, therefore, treated this stock as being held for the bank, and if any loss results it is to be the loss of the bank and, of course, if any profit results it will likewise accrue to the bank.

I am taking this opportunity also of setting out the understanding reached in connection with the proposal submitted by us to Mr. Alexander Miller to exchange 4000 shares of stock of the Yakima Holding Corporation for 5000 shares of stock of the Sunshine Mining Company. We are doing this on the express understanding that stock of the Sunshine Mining Company will be taken over by the bank at the stipulated price of \$12.00 per share. This understanding is to apply to any further similar transactions.

I would ask you to signify that this is also in accordance with your understanding of these transactions by signing the acknowledgment on the bottom of this letter.

Yours very truly,

GEO. H. BRADSHAW

Secretary."

"The above represents the understanding that has been reached between the bank and the Yakima Holding Corporation with respect

to the matters set out above and the same is hereby approved.

YAKIMA FIRST
NATIONAL BANK
By H. F. CRAWFORD
Cashier."

On January 6, 1935, an entry was made in the books of the Holding Company showing the "appreciation write-up" as to said 7500 shares at the rate of twenty-five cents per share [419] in the sum of \$1875.00, in accordance with the above agreement; and the said sum of \$1875.00 was reported as income of the Holding Company in its income tax return for 1935 as profit on the sale of stock. The Holding Company received and retained the dividends paid upon said Sunshine stock herein referred to until it was delivered to the Bank and sold by the Bank in April, 1935; and the Holding Company reported said dividends in its income tax return, as its income, in accordance with the verbal understanding between the Bank and the Holding Company.

7.

That on February 5, 1935, at the annual stockholders' meeting of the Holding Company, the financial statement of said Holding Company was presented which, among other things, in the list of assets provided as follows: "Other stock investments, \$61,451.50", which included and referred to the investment in said 7500 shares of Sunshine

stock. No reference was made in the minutes of said stockholders' meeting to said stock being held by the Holding Company in trust or as trustee for the said Bank, or that such stock had been sold to the Bank.

8.

That on April 12, 1935, a meeting of the executive committee of the Holding Company was held; and the minutes of said meeting provide in part as follows:

“Mr. Hardy stated there were several matters that required action by the executive committee and stated that the first matter was a proposal to Mr. Alex Miller to exchange 4000 shares of stock of the Yakima Holding Corporation for 5000 shares of Sunshine Mining Company stock on the basis of placing a value of \$15.00 per share on the stock of the Holding Corporation and \$12.00 per share on the stock of the Sunshine Mining Company. This proposal was made to Mr. Miller under date of December 11, 1934, and accepted by him. It was then moved by Mr. Clift, seconded by Mr. Rightmire, that we approve and ratify the proposal for the exchange of stock as outlined and authorize its completion. Carried. [420]

“The secretary then stated that at the time this transaction with Mr. Miller was discussed by the officers an understanding was reached that if the transaction were completed that the Yakima First National Bank would take over

from the Yakima Holding Corporation the 5000 shares of Sunshine at \$15.00 per share; also the 7500 shares of Sunshine stock already owned by the Yakima Holding Corporation at the cost price of same, all in accordance with a letter setting out this understanding dated December 12, 1934 from the secretary to the bank and approved by the bank.

“It was then moved by Mr. Rightmire, seconded by Mr. Clift, that the arrangements between the Holding Corporation and the bank as outlined by the secretary be approved and ratified, which motion being put was unanimously approved.”

The use of the figure \$15.00 per share in reference to the said 5000 shares of Sunshine stock in the minutes of the holding company executive committee for the meeting of April 12, 1935, was based upon inadvertent error and mistake, and the correct amount thereof was in truth and in fact \$12.00 per share, and the Miller transaction was carried out upon the basis of \$12.00 per share paid to Miller for the said 5000 shares of Sunshine stock, rather than \$15.00 per share.

That at the time of the purchase of said 7500 shares of stock, entries were made with reference thereto on the books of the holding company in its ledger account and its cash disbursement journal, entitled “Sunshine Mining Co. stock.” The said ledger entries with reference thereto have as specifically designated items on the ledger page

the initials Y F N B for the description of the number of shares and the price paid for each share. Other sheets of said ledger show that almost without exception similar designations were placed in front of the descriptions of property the title of which was concededly in the Holding Company.

9.

In April, 1935, the 7500 share block of Sunshine stock were sold by the Bank for \$135,835.54. The cost of such stock to the Holding Company was \$59,576.50, making a gross profit on the purchase and sale, if the stock and the profit thereon [421] belonged to the Holding Company, \$76,259.04. The cost of such stock to the Bank was \$61,451.50 (being the amount the Bank agreed to pay the Holding Company, and the amount of interest therein reported by the Holding Company to its stockholders), making the gross profit on the purchase and sale, if the stock belonged to the Bank in 1935, \$74,384.04.

10.

The court finds that said profit constituted income of the Holding Company for the year 1935 and not income of the Bank.

11.

That on December 11, 1934, the Holding Company wrote to Alex Miller offering to exchange 4000 shares of stock in the Holding Company on the basis of \$15.00 per share, for 5000 shares of Sunshine stock on the basis of \$12.00 per share.

By letter of December 11, 1934, Miller accepted this offer and on the same date he deposited with the plaintiff Guaranty Trust Company as a trust company, his certificate for 5000 shares of the Sunshine stock, authorizing said trust company to deliver it to the holding Company in exchange for 4000 shares of stock in the Holding Company. Mr. Miller's letter imposed a condition of said exchange; but the court finds that such condition and proviso was waived by Mr. Miller and that he consented that the said exchange deal be consummated without compliance with any condition.

12.

That on December 12, 1934, the Holding Company by its secretary, George H. Bradshaw, wrote the letter to the Bank which is quoted above in paragraph 6. The foregoing agreement was executed and delivered on December 12, 1934, and was performed. [422]

13.

No entries were made in the books of the Holding Company with reference to the Alex Miller transaction or the said 5000 shares of Sunshine stock; and the stock never stood in the name of the Holding Company.

14.

That in April, 1935, the said 7500 shares and 5000 shares of Sunshine stock hereinabove referred to, or a total of 12,500 shares which had been theretofore delivered to the Bank, were delivered by the said Bank to Drumbheller, Ehrlich-

man & White, a stock brokerage concern, who sold 11,000 shares thereof on the instruction of the Bank, and the said brokers paid to the Bank therefor, \$135,835.54, being the net proceeds of sale of said 7500 shares of Sunshine stock and \$63,389.91 being the net proceeds of sale of 3500 shares of Sunshine stock, being a part of the said 5000 shares acquired from Alex Miller, or a total selling price of said 11,000 shares, in the sum of \$199,225.45. The remaining 1500 shares of said Sunshine stock were duly redelivered to the said Bank by the brokers.

15.

Out of the proceeds of the sale the Bank paid Miller for the 5000 shares of Sunshine and paid the Holding Company the amount which it had paid for the 7500 shares, its costs incurred, and the twenty-five cents per share appreciation, all in accordance with the agreement of December 12, 1934.

16.

That the selling price of said 3500 shares, or the net proceeds of sale thereof, was \$63,389.91, and the cost or purchase price thereof was \$42,000.00. The resulting profit on the purchase and sale of said 3500 shares of Sunshine stock was \$21,389.91.

[423]

17.

That the income or profit on all of the stock, both the 7500 block and the 3500 block, was actually received and retained by the Bank.

18.

The transaction with Alex Miller with reference to the 5000 shares of Sunshine stock was originally in December, 1934, and at all times, made, agreed upon, consummated and put through for the benefit of the Bank. The reason for the method used in handling the transactions was that the parties realized the restrictions upon national banks in the purchase of stock in corporations. The transactions were not handled in that manner in order to evade or reduce payment of income taxes of either the Bank or the Holding Company.

19.

The transaction as to the 7500 shares of Sunshine stock and the said Alex Miller transaction as to said 5000 shares of Sunshine stock were at all times two separate and distinct transactions. The 5000 shares of Alex Miller Sunshine stock were never in the possession of the Holding Company.

20.

The court finds that the said 5000 shares of Sunshine stock was acquired from Alex Miller for the Bank, and the Holding Company acted in a trust capacity for, or as the agent of, the Bank and that at all times until the sale thereof the actual, equitable and beneficial owner and holder of the said 5000 shares of Sunshine stock was the Yakima First National Bank and was not the Holding Company.

21.

That there was no fraud or bad faith on the part of any of the said corporations or their officers or agents with reference to any of the transactions involved herein, and no fraud or bad faith in making any of the income tax returns of any of [424] said corporations for the year 1935. At the time the said income tax returns for 1935 were made, the Holding Company, its officers and agents, did not know that it owed any taxes upon income derived from any of the transactions involved herein, and bona fide believed that all of the profit belonged to the Bank, and said taxpayer did not fraudulently or knowingly fail to report any income or profit derived from any of the transactions involved herein. That by reason thereof, no fraud penalty could properly be assessed against any of said corporations, including the Holding Company, with reference to any of the transactions involved herein. There was no wrongdoing on the part of any of the said corporations, including the Holding Company, or its officers or agents, in connection with any of the transactions involved herein, and there was no purpose or intention on the part of the Holding Company or its officers or agents or any of the corporations referred to herein to evade any tax believed by said parties to be owed to the defendant; and there was no fraudulent intent whatsoever by any of said parties with reference thereto.

22.

Thereafter, in 1937, the United States Commissioner of Internal Revenue assessed a deficiency against the plaintiff herein for income tax for the year 1935 in the sum of \$13,037.55, together with a 50% fraud penalty thereon under Section 293 (b) of the Revenue Act of 1934, in the sum of \$6,518.78, and a deficiency in excess profits tax against the plaintiff for the year 1935 in the sum of \$3,477.96, and a 50% fraud penalty thereon under said section of said statute in the sum of \$1,738.98, or total additional tax in the sum of \$16,515.51, plus 50% fraud penalty thereon in the sum of \$8,257.76, or the total sum of \$24,773.27.

[425]

23.

Thereafter, in May, 1937, plaintiff duly mailed and filed with the Commissioner of Internal Revenue, as provided by law, a written, sworn protest as to said deficiency tax assessments and penalties, and sworn affidavits in support of said protest. Thereafter said protest was overruled and denied by said Commissioner of Internal Revenue, and said alleged tax deficiency assessments and penalties as aforesaid were ordered paid.

24.

That thereafter, and on or about the 27th day of May, 1938, the plaintiff paid to the defendant the said sum of \$24,773.27 plus interest thereon in the sum of \$2160.59 to said date, or a total payment of \$26,933.86, in payment of said alleged deficiency

tax assessments and penalties hereinabove referred to, as required by said Commissioner of Internal Revenue of the defendant.

25.

Thereafter, and on or about the 1st day of March, 1940, plaintiff duly filed with the defendant written, sworn, claims for refund of said alleged additional taxes and penalties assessed against the plaintiff as aforesaid. Plaintiff filed a claim for refund for said income tax and excess profits tax paid as aforesaid, and plaintiff filed a separate claim for refund of said penalties paid by it as aforesaid. On or about the 4th day of October, 1940, the defendant by its Commissioner of Internal Revenue disallowed and denied said claims for refund.

26.

That the Collector of Internal Revenue of the defendant, by whom said income and excess profits taxes and penalties were collected from the plaintiff as aforesaid, is not now in office as Collector of Internal Revenue and was not in office as such at the time of the commencement of this suit. That the present United States Collector of Internal Revenue for the [426] State of Washington took office as such only a few months prior to the commencement of this action.

27.

That the said sums collected by the defendant from the plaintiff were erroneous, excessive, im-

proper, and illegal as to the income tax and excess profits tax based upon the profits of the purchase and sale of said 3500 shares of Alex Miller Sunshine stock, and as to interest collected thereon and as to the said 50% fraud penalties. The amount of said overpayment of income tax was \$2,941.11; the amount of said overpayment of excess profits tax was \$1,069.50; the amount of overpayment of interest thereon was \$524.67; and the amount of fraud penalty illegally collected as hereinabove stated was \$8,257.76, or a total tax overpayment and illegal collection as of the said date of payment, May 27, 1938, in the sum of \$12,793.04. That by reason of the premises the defendant is now lawfully indebted to the plaintiff herein in the said sum of \$12,793.04, together with interest thereon at the legal rate of 6% per annum from May 27, 1938 as provided by law. That no part thereof has been paid by the defendant to the plaintiff.

From the foregoing Findings of Fact the court now makes the following

CONCLUSIONS OF LAW:

1.

That under the laws and statutes of the United States, and particularly the Tucker Act and the Internal Revenue Code, the above entitled court has jurisdiction of the subject matter of this action and of the parties herein.

2.

That the defendant erroneously, wrongfully, improperly and illegally assessed and collected from the plaintiff herein overpayment of taxes, including said interest and fraud penalty, as of May 27, 1938, the date of payment, in the said sum of \$12,793.04.

[427]

3.

That by reason of the premises the defendant is now lawfully indebted to the plaintiff, and the plaintiff is entitled to have and recover judgment against the defendant herein the said sum of \$12,793.04, together with interest thereon at the rate of 6% per annum from May 27, 1938, as provided by law, together with plaintiff's costs and disbursements consisting of clerk's filing fees and witness fees to be taxed herein pursuant to statute pertaining thereto.

The court does accordingly hereby order and direct that such judgment be entered in favor of the plaintiff and against the defendant herein the said sum of \$12,793.04, together with interest and costs as aforesaid.

Done in Open Court this 31st day of July, 1942.

L. B. SCHWELLENBACH

District Judge.

Presented by

CHENEY & HUTCHESON

Attys. for Pltf.

[Endorsed]: Filed Jul. 31, 1942. [428]

In The District Court of The United States for The
Eastern District of Washington, Southern
Division

No. Civ 68

GUARANTY TRUST COMPANY, a corporation,
as liquidating trustee of YAKIMA HOLDING
CORPORATION, a corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

This cause having heretofore duly and regularly come on for trial before the undersigned judge of the above entitled court, sitting without a jury, and the plaintiff being represented by its officers and by its attorneys, Cheney & Hutcheson, and the defendant being represented by its attorneys, Lyle Keith, Harvey Ericksen, and Thomas R. Winter; and the court having heard the evidence introduced by each of the parties, and all parties having rested, and the court having heard the arguments of counsel and being duly advised in the premises, and the court having rendered and filed its written Detailed Opinion of the Court on the Facts and the written Opinion of the Court; and the court having heretofore duly made and entered its findings of fact and conclusions of law herein, and having duly considered the same;

Now, Therefore, It Is Hereby Ordered, Adjudged And Decreed that the plaintiff herein, Guaranty Trust Company, a corporation, as liquidating trustee of Yakima Holding Corporation, a corporation, does hereby have and recover judgment against the defendant herein, the United States of America, in the sum of \$12,793.04, together with interest thereon at the rate of 6% per annum from May 27, 1938, as provided by law, and together with plaintiff's costs and disbursements, consisting of clerk's filing fees and witness fees, herein to be taxed pursuant to statutes applicable to said suit.

Defendant excepts and its exception is allowed. Plaintiff [429] excepts to the amount of recovery as inadequate, and its exception is allowed.

Done In Open Court this 31st day of July, 1942.

L. B. SCHWELLENBACH,

District Judge.

Presented Without Prejudice

By CHENEY & HUTCHESON

Attys. for Pltf.

[Endorsed]: Filed Jul. 31, 1942. [430]

[Title of District Court and Cause.]

NOTICE OF APPEAL.

Notice Is Hereby Given that Guaranty Trust Company, a corporation, as liquidating trustee of Yakima Holding Corporation, a corporation, the plaintiff above named, hereby appeals to the Circuit

Court of Appeals for the Ninth Circuit from the final judgment entered in this action on July 31, 1942, and particularly from that portion thereof allowing the plaintiff judgment against the defendant in only the sum of \$12,793.04, plus interest and costs, whereas the amount of said recovery should have been the full amount sued for, to-wit, \$26,933.86, together with interest thereon at 6% per annum from May 27, 1938, until paid, together with costs.

CHENEY & HUTCHESON,
ELWOOD HUTCHESON,

Attorneys for Appellant Guaranty Trust Company as liquidating trustee of Yakima Holding Corporation.

Address: 426 Miller Building, Yakima, Washington.

Copies mailed 10/29/42 to Edward M. Connelly, U. S. Attorney, and Thomas Winters, T. G.

[Endorsed]: Filed Oct. 28, 1942. [431]

[Title of District Court and Cause.]

BOND ON APPEAL.

Know All Men By These Presents:

That the undersigned, Guaranty Trust Company, a corporation, as liquidating trustee of Yakima Holding Corporation, a corporation, the plaintiff in the above entitled action, as principal, and Occidental Indemnity Company, a corporation organ-

ized under the laws of the State of California, and authorized to transact the business of surety in the State of Washington, as surety, are held and firmly bound unto the above entitled defendant, United States of America, in the penal sum of Two Hundred Fifty (\$250.00) Dollars, lawful money of the United States for the payment of which well and truly to be made, the said principal and the said surety bind themselves, their heirs and personal representatives or successors jointly and severally, firmly by these presents.

Dated and sealed this 27th day of October, 1942.

Whereas, on the 31st day of July, 1942, the above entitled court rendered and entered a final judgment in the above entitled cause in favor of the above named plaintiff against the above named defendant in the sum of \$12,793.04, together with interest and costs.

And whereas, the said plaintiff and appellant feeling aggrieved by the inadequacy of recovery in said judgment, and desiring to appeal from the same to the Circuit Court of Appeals for the Ninth Circuit and perfect said appeal by this bond; [432]

Now, Therefore, the condition of the above obligation is such, that if the said appellant will pay all costs and damages that may be awarded against it on said appeal, if the said appeal is dismissed or the judgment affirmed, and all of such costs and damages as the appellate court may award if the judgment is modified, not exceeding the sum of Two Hundred Fifty (\$250.00) Dollars, then this obliga-

tion shall be void, otherwise to remain in full force and virtue.

GUARANTY TRUST COMPANY, a corporation, as liquidating trustee of Yakima Holding Corporation, a corporation,
Plaintiff and Appellant.

By CHENEY & HUTCHESON,
Its Attorneys.

[Corporate Seal] OCCIDENTAL INDEMNITY COMPANY,

By WALTER J. FUNK,
Its Attorney in Fact.

[Endorsed]: Filed Oct. 28, 1942. [433]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL.

Comes now the above named plaintiff and appellant herein and makes the following statement of the points on which appellant intends to rely on its appeal in the above entitled cause:

1. That the amount of recovery herein is inadequate.
2. That the amount of the judgment herein in favor of the plaintiff and against the defendant, instead of \$12,793.04, plus interest and costs should have been entered in favor of the plaintiff in the sum of \$26,933.86, together with interest thereon at

6% per annum from May 27, 1938, until paid, together with costs.

3. That the 7500 shares of Sunshine stock referred to in paragraph 6 and elsewhere in the findings of fact herein were purchased and held by Yakima Holding Corporation as trustee for Yakima First National Bank, and that the entire profit or loss thereon accrued to said bank and not to said holding company, and the profit thereon was wholly taxable to said bank, and not to said holding company.

4. That plaintiff is entitled to recover herein, in addition to the amount of the judgment entered, all taxes, interest and penalties paid by virtue of the profit on the purchase and sale of said 7500 shares of Sunshine stock hereinabove referred to, as well as on the 3500 shares of stock obtained from Alex Miller.

CHENEY & HUTCHESON,
ELWOOD HUTCHESON,
Attorneys for Plaintiff and
Appellant

[Endorsed]: Filed Oct. 28, 1942. [434]

[Title of District Court and Cause.]

AFFIDAVIT OF SERVICE BY MAIL.

State of Washington,
County of Yakima—ss.

Helen M. Laws, being first duly sworn, on oath deposes and says: That at all the times hereinafter

mentioned she was and now is a citizen of the United States and of the State of Washington and a resident of Yakima County, in said State, above the age of twenty-one years and not a party to, or in any way interested in the above named action, and competent to be a witness therein; that she received originals of Designation of the Record on Appeal and of Statement of Points on Appeal in the above entitled action on the 28th day of October, 1942, and that on the 28th day of October, 1942, she duly served a true and correct copy of each of the same upon each of the attorneys of record for the defendant named in said action, to-wit: Edward M. Connelly and Thomas R. Winter, by depositing said copies in the post office at Yakima, Washington, addressed to the said attorneys, the same having been directed to them at their place of business, to-wit: Edward M. Connelly, United States Post Office Building, Spokane, Washington; and Thomas R. Winter, Federal Office Building, Spokane, Washington, the same being sent by regular mail with the postage prepaid thereon.

HELEN M. LAWS.

Subscribed and sworn to before me this 28th day of October, 1942.

[Notarial
Seal]

ELWOOD HUTCHESON,

Notary Public for Washington.

Residing at Yakima, Washington.

[Endorsed]; Filed Oct. 28, 1942. [435]

[Title of District Court and Cause.]

NOTICE OF APPEAL.

Notice is hereby given that the United States of America, the defendant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit, from the final judgment entered in this action on July 31, 1942.

EDWARD M. CONNELLY,

United States Attorney.

HARVEY ERICKSON,

Assistant United States Attorney.

Copy mailed 10/27/42 to Cheney & Hutcheson.

[Endorsed]: Filed Oct. 27, 1942. [436]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH CROSS-
APPELANT INTENDS TO RELY ON AP-
PEAL.

Cross-Appellant states that it will rely on the following points in its appeal in the above-entitled cause:

1. The District Court erred in holding that the Yakima First National Bank was the equitable owner of 3500 shares of stock of the Sunshine Mining Company.

2. The District Court erred in not holding that the Bank was not entitled to purchase the Sunshine Company's shares for its own account.

3. The District Court erred in not holding that the Bank had no capacity to take legal title to the

shares, and therefore it could not become the beneficiary of a trust for such property.

4 The District Court erred in holding that the Yakima Holding Corporation acted in a trust capacity for, or as agent of, the Bank, and that at all times until the sale thereof the actual, equitable and beneficial owner and holder of the said 3500 shares of Sunshine stock was the Yakima First National Bank, and not the Holding Company.

5. The District Court erred in entering judgment for the plaintiff.

EDWARD M. CONNELLY,
United States Attorney.
HARVEY ERICKSON,
Assistant U. S. Attorney.

[Endorsed]: Filed Jan. 21, 1943. [437]

[Title of District Court and Cause.]

AFFIDAVIT OF MAILING.

State of Washington,
County of Spokane—ss.

Helen Bingenheimer, being first duly sworn on oath deposes and says: That she is now and was at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of twenty-one years and competent to be a witness in the above entitled case; that on January 21, 1943, affiant served Cross-Appellant's Statement of Points On Which Cross-Appellant Intends to

Rely On Appeal upon Cheney & Hutcheson, Attorneys for Guaranty Trust Company, a corporation, as Liquidating Trustee of Yakima Holding Corporation, a corporation, in the above entitled cause by enclosing a true copy of said Cross-Appellant's Statement Of Points On Which Cross-Appellant Intends To Rely On Appeal in a franked envelope addressed to Cheney & Hutcheson, Attorneys at Law, 426 Miller Building, Yakima, Washington, and depositing said envelope in the United States Post Office at Spokane, Washington; that there is a regular United States mail service between Spokane, Washington, and Yakima, Washington.

HELEN BINGENHEIMER,

Subscribed and sworn to before me this 21st day of January, 1943.

HARVEY ERICKSON,

Notary Public in and for the
State of Washington, residing
at Spokane.

[Endorsed]: Filed Jan. 21, 1943. [438]

[Title of District Court and Cause.]

DESIGNATION OF THE RECORD
ON APPEAL

Comes now the plaintiff and appellant above named and hereby designates that the following portions of the record, files and proceedings herein shall be contained in the record on its appeal herein:

1. Summons.
2. Complaint.
3. Answer.
4. Pretrial order dated September 29, 1941.
5. Pretrial order dated December 4, 1941.
6. Detailed opinion of the court on the facts.
7. Opinion of the court.
8. Findings of fact and conclusions of law.
9. Judgment.
10. Notice of our appeal with date of filing thereof.
11. Bond on our appeal.
12. Designation of the record on appeal.
13. Statement of points on appeal.
14. Affidavit of mailing same.

CHENEY & HUTCHESON

ELWOOD HUTCHESON

Attorneys for Plaintiff and
Appellant.

[Endorsed]: Filed Oct. 28, 1942. [439]

[Title of District Court and Cause.]

CROSS - APPELLANT'S DESIGNATION OF
ADDITIONAL PORTIONS OF RECORD
ON APPEAL.

Comes now the defendant and cross-appellant above named, and hereby designates that the following portions of the record on the proceedings herein shall be contained in the record on appeal herein

and is necessary in order that the defendant and cross-appellant may properly present its case in the United States Circuit Court of Appeals:

1. Transcript of the testimony.
2. Defendant's notice of appeal.
3. All exhibits.

EDWARD M. CONNELLY

United States Attorney

HARVEY ERICKSON

Assistant United States
Attorney

[Endorsed]: Filed Nov. 17, 1942. [440]

[Title of District Court and Cause.]

ORDER ALLOWING TRANSCRIPT OF TESTIMONY TO BE MADE SUPPLEMENTARY RECORD

The Court having read the Motion of Edward M. Connelly, United States Attorney for the Eastern District of Washington, and Harvey Erickson, Assistant United States Attorney for said District, and the Affidavit of Harvey Erickson, attached, it is

Ordered and Adjudged that the cross-appellant's Designation of Record filed in said case on November 19, 1942, in respect to the testimony, a transcript of the testimony only be made a supplementary record in said case.

Dated this 21 day of November, 1942.

L. B. SCHWELLENBACH

United States District Judge

Presented by:

HARVEY ERICKSON

[Endorsed]: Filed Nov. 21, 1942. [441]

[Title of District Court and Cause.]

CROSS - APPELLANT'S SUPPLEMENTAL
DESIGNATION OF ADDITIONAL POR-
TIONS OF RECORD ON APPEAL

Comes now the defendant, and cross-appellant above named, and hereby designates the following supplemental portions of the record of the proceedings herein which shall be contained in the record on appeal herein, and is necessary in order that the defendant and cross-appellant may properly present its case in the United States Circuit Court of Appeals:

a. Exhibit 15, besides the minutes of a meeting of the Executive Committee of the Yakima Holding Corporation, held on April 12, 1935, to include the minutes of the meeting of stockholders of the Yakima Holding Corporation on February 5, 1935.

b. Article II of the Articles of Incorporation of the Yakima Holding Corporation.

c. Article II, Sections 12 and 15 of the By-Laws of the Yakima Holding Corporation.

d. Article III of the By-Laws of the Yakima Holding Corporation.

EDWARD M. CONNELLY

United States Attorney

HARVEY ERICKSON

Assistant United States

Attorney

[Endorsed]: Filed Jan. 20, 1943. [442]

[Title of District Court and Cause.]

AFFIDAVIT OF MAILING

State of Washington,
County of Spokane—ss.

Margaret Juliano, being first duly sworn on oath deposes and says: That she is now and was at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of twenty-one years and competent to be a witness in the above-entitled case; that on January 20, 1943, affiant served Cross Appellant's Supplemental Designation of Additional Portions of Record on Appeal upon Cheney and Hutcheson, attorneys for Guaranty Trust Company, a corporation, as liquidating trustee of Yakima Holding Corporation, a corporation, in the above-entitled cause by enclosing a true copy of said Cross-Appellant's Supplemental Designation of Additional Portions of Record on Appeal in a franked envelope addressed to Cheney and Hutcheson, attorneys at law, 426

Miller Building, Yakima, Washington, and depositing said envelope in the United State Post Office at Spokane, Washington; that there is regular United States mail service between Spokane, Washington, and Yakima, Washington.

MARGARET JULIANO

Subscribed and sworn to before me this 20th day of January, 1943.

HARVEY ERICKSON

Notary Public in and for the State of Washington,
residing at Spokane.

[Endorsed]: Filed Jan. 20, 1943. [443]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR DOCKET-
ING AND FILING RECORD ON APPEAL

It appearing to the Court that the notice of appeal in the above-entitled case was filed on October 28, 1942, and that on November 21, 1942 an order was signed making the statement of facts a supplementary record on appeal, and it appearing to the Court that the forty days provided by Rule 73(g) of the Rules of Civil Procedure will expire within forty days from October 28, 1942, and that it will be impossible to obtain the statement of facts from the court reporter, Mrs. J. J. Cole, within said time;

Therefore, It Is Ordered that the time for docketing and filing the record on appeal shall be extended ninety days from the first notice of appeal on October 28, 1942.

Dated this 28th day of November, 1942.

L. B. SCHWELLENBACH

United States District Judge

Presented by:

HARVEY ERICKSON

Assistant United States Attorney

[Endorsed]: Filed Nov. 28, 1942. [444]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO TRANSCRIPT
OF RECORD

United States of America,
Eastern District of Washington—ss.

I, A. A. LaFramboise, Clerk of the District Court of the United States for the Eastern District of Washington do hereby certify the foregoing type-written pages numbered 1 to 444 inclusive to be a full, true, correct and complete copy of so much of the record, papers and all other proceedings in the above entitled cause, as are necessary to the hearing of the appeal therein, in the United States Circuit Court of Appeals, as called for by the appellant in its Designation of the Record on Appeal and the Designation of Cross-Appellant of Additional Portions of Record on Appeal, and Supplemental Designation of Cross-Appellant, as the same remain of record and on file in the office of the Clerk of the District Court, and that the same constitute the record on appeal from the judgment of the Dis-

trict Court of the United States for the Eastern District of Washington to the Circuit Court of Appeals for the Ninth Judicial Circuit, at San Francisco, California.

I further certify that the cost of preparing and certifying that portion of the Transcript as designated by the Appellant is the sum of \$10.00, and that the said sum has been paid to me by Cheney & Hutcheson, Attorneys for the Appellant.

In Witness Whereof I have hereunto set my hand and affixed the seal of said District Court at Spokane in said District this 23rd day of January, 1943.

[Seal]

A. A. LaFRAMBOISE

Clerk.

[Endorsed]: No. 10356. United States Circuit Court of Appeals for the Ninth Circuit. Guaranty Trust Company, a corporation, as liquidating trustee of Yakima Holding Corporation, Appellant, vs. United States of America, Appellee, and United States of America, Appellant, vs. Guaranty Trust Company, a corporation, as liquidating trustee of Yakima Holding Corporation, Appellee. Transcript of Record. Upon Appeals from the District Court of the United States for the Eastern District of Washington, Southern Division.

Filed January 26, 1943.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10356

GUARANTY TRUST COMPANY, a corporation,
as liquidating trustee of YAKIMA HOLDING
CORPORATION, a corporation,

Plaintiff Appellant,

vs.

UNITED STATES OF AMERICA,

Defendant Appellant.

STATEMENT OF POINTS ON APPEAL

Comes now Guaranty Trust Company, a corporation, as liquidating trustee of Yakima Holding Corporation, a corporation, the plaintiff and appellant above named, and makes the following statement of the points on which it intends to rely on its appeal in the above entitled cause:

1. That the amount of recovery herein is inadequate.

2. That the amount of the judgment herein in favor of the plaintiff and against the defendant, instead of \$12,793.04, plus interest and costs, should have been entered in favor of the plaintiff in the sum of \$26,933.86, together with interest thereon at 6% per annum from May 27, 1938, until paid, together with costs.

3. That the 7500 shares of Sunshine stock referred to in paragraph 6 and elsewhere in the findings of fact herein were purchased and held by Yakima Holding Corporation as trustee for Yakima First National Bank, and that the entire profit or loss

thereon accrued to said bank and not to said holding company, and the profit thereon was wholly taxable to said bank, and not to said holding company.

4. That plaintiff is entitled to recover herein, in addition to the amount of the judgment entered, all taxes, interest and penalties paid by virtue of the profit on the purchase and sale of said 7500 shares of Sunshine stock hereinabove referred to, as well as on the 3500 shares of stock obtained from Alex Miller.

CHENEY & HUTCHESON

ELWOOD HUTCHESON

Attorneys for Plaintiff

Appellant

[Endorsed]: Filed Feb. 8, 1943.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF RECORD

Comes now Guaranty Trust Company, a corporation, as liquidating trustee of Yakima Holding Corporation, a corporation, the plaintiff and appellant above named, and hereby designates the following parts of the record herein to be printed which it thinks necessary for the consideration of its appeal herein, to-wit:

1. Summons.
2. Complaint.
3. Answer.
4. Pretrial order dated September 29, 1941.

5. Pretrial order dated December 4, 1941.
6. Detailed opinion of the court on the facts.
7. Opinion of the court.
8. Findings of fact and conclusions of law.
9. Judgment.
10. Both notices of appeal with dates of filing thereof.
11. Bond on appeal.
12. All statements of points on appeal.
13. All designations of record on appeal.
14. All affidavits of mailing said statements of points and designations of record.

CHENEY & HUTCHESON

ELWOOD HUTCHESON

Attorneys for Plaintiff

Appellant

[Endorsed]: Filed Feb. 8, 1943.

[Title of Circuit Court of Appeals and Cause.]

ADOPTION OF POINTS RELIED ON BY
DEFENDANT CROSS APPELLANT FOR
APPEAL

Comes now the defendant cross appellant, United States of America, and states that it adopts the Statement of Points On Appeal filed with the Clerk of the Trial Court in the above entitled case, in lieu of filing a new Statement of Points under Rule 19, paragraph 6, Rules of CCA 9 (A).

EDWARD M. CONNELLY

United States Attorney

HARVEY ERICKSON

Assistant U. S. Attorney

[Endorsed]: Filed Feb. 23, 1943.

IN THE

United States Circuit Court
of Appeals ³
FOR THE NINTH CIRCUIT

GUARANTY TRUST COMPANY, a corporation, as
liquidating trustee of Yakima Holding Cor-
poration,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

and

UNITED STATES OF AMERICA,

Appellant,

vs.

GUARANTY TRUST COMPANY, a corporation, as
liquidating trustee of Yakima Holding Cor-
poration,

Appellee.

BRIEF OF APPELLANT,
GUARANTY TRUST COMPANY

UPON APPEALS FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE EASTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

FILED

APR 25 1943

CHENEY & HUTCHESON
JOSEPH C. CHENEY
ELWOOD HUTCHESON

PAUL P. O'BRIEN
CLE 426
Attorneys for Guaranty Trust Company
426 Miller Building
Yakima, Washington

INDEX

	<i>Page</i>
JURISDICTIONAL STATEMENT	1
STATEMENT OF THE CASE	2
SPECIFICATION OF ERRORS	20
ARGUMENT	21
1. SUMMARY OF ARGUMENT	21
2. EFFECT TO BE GIVEN TO DISTRICT COURT'S FINDINGS OF FACT	23
3. HOLDING COMPANY HELD THE STOCK IN TRUST OR AS AGENT FOR THE BANK	31
4. EXPLANATION OF FACTS RELIED UPON BY DEFENDANT	37
5. AUTHORITIES ESTABLISH TRUST RELATION- SHIP	47
6. PRESUMPTION OF COMMISSIONER'S COR- RECTNESS WAS FULLY OVERCOME BY THE EVIDENCE	50
7. CLEAR AND CONVINCING EVIDENCE UNNECESSARY	54
8. ILLEGALITY NO DEFENSE	56
9. PROFIT ON SALE OF STOCK WAS TAXABLE TO BANK AS BENEFICIAL OWNER	63
10. MILLER STOCK WAS NOT TAXABLE TO HOLD- ING COMPANY	68
11. FRAUD PENALTY WAS ILLEGALLY ASSESSED BY COMMISSIONER	71
12. ACTION LIES UNDER TUCKER ACT	74
APPENDIX	App-1

TABLE OF CASES

	<i>Page</i>
Adamson v. Black Rock Power & Irrigation Co., (C.C.A. 9) 297 Fed. 905	48-App-1
Albrecht & Son v. Landy, Collector, 114 F. 2d 202	54
American Home Fire Ins. Co., v. Hargraves, 109 F. 2d 86..	28
Ariasi v. Orient Insurance Co., 50 F. 2d 548	50
Angelus Building & Investment Co. v. Commissioner, (C.C.A. 9) 57 F. 2d 130, cert. den. 286 U. S. 562	57

Anning v. Rothschild & Co., 130 Wash. 232, 226 Pac. 123	53
A. S. Kreider Company v. U.S., (C.C.A. 3) 117 F. 2d 133	74
Atherton v. Anderson, 86 F. 2d 518	62
Becker v. Scofield, (C.C.A. 9) 221 Fed. 322, affirmed 243 U.S. 114, 61 L. Ed. 626	57
Beeman v. Puget Sound T.L. & P. Co. 79 Wash. 137, 139 Pac. 1087	52
Bettendorf v. Commissioner, (C.C.A. 8) 49 F. 2d 173	65
Blair v. Commissioner, 300 U.S. 5, 57 S. Ct. 330, 81 L. Ed. 465	67
Bradley v. Savage, Inc., 13 Wn. (2d) 28, 123 P. 2d 780	53
Budd v. Commissioner (C.C.A. 3) 43 F. 2d 782	73
Byrne v. Commissioner, (C.C.A. 3) 110 F. 2d 294	65
Campana Corporation v. Harrison, (C.C.A. 7) 114 F. 2d 400	28
Castle & Co. v. Public Service Underwriters, 198 Wash. 576, 89 P. 2d 506	46
Caswell v. Maplewood Garage, 84 N.H. 241, 149 Atl. 746, 73 A.L.R. 433	53
Central Life Society v. Commissioner 51 F. 2d 939	65
Chicago, etc., Ry Co. v. Des Moines, etc., Ry. Co., 254 U.S. 196, 41 S. Ct. 81, 65 L. Ed. 219	48-App.-3
Clarke & Wilson Lumber Co. v. McCallister, (C.C.A. 9) 101 F. 2d 709	28
Commissioner v. Branch, (C.C.A. 1) 114 F. 2d 985, 132 A.L.R. 839	66
Commissioner v. O'Donnell (C.C.A. 9) 90 F. 2d 907	66
Commissioner v. Woods Machinery Co., (C.C.A. 1) 57 F. 2d 635	73
Connery Coal & Investment Co. v. Commissioner, (C.C.A. 7) 84 F. 2d 485	66
Cooper v. Hill, 94 Fed. 582	62
Cooperative Publishing Co. v. Commissioner, 115 F. 2d 1017	52

Creditors Claim & Adjustment Co. v. Northwest Loan & Trust Co., 81 Wash. 247, 142 Pac. 670, L.R.A. 1917 A 737, Ann. Cas. 1916 D 551	46
Crowell v. Baker Oil Tools, (C.C.A. 9) 99 F. 2d 574	28
C.T.C. Investment Co. v. U.S., (C.C.A. 7) 108 F. 2d 383	74
DeBrabant v. Commissioner, (C.C.A. 2) 90 F. 2d 433	65
DeLone v. Commissioner, (C.C.A. 3) 110 F. 2d 507	73
Del Vecchio v. Bowers, 296 U.S. 280, 80 L. Ed. 229, 56 S. Ct. 190	52
Donovan v. Welch, 90 N.W. 262	49
Department of Water and Power v. Anderson, (C.C.A. 9) 95 F. 2d 577,583, certiorari denied, 281 U.S. 607	54
Edmonds v. Commissioner, (C.C.A. 9) 90 F. 2d 14, cert. den. 302 U.S. 713	66
Equitable Life Assur. Soc. v. McDonald, (C.C.A. 9) 305 U.S. 624	54
Equitable Trust Co. v. Washington-Idaho Light & Power Co., 300 Fed. 601	47
Erie Ry. Co. v. Tompkins, 304 U.S. 64, 82 L. Ed. 1188, 114 A.L.R. 1487	46, App.-5
Fiocco v. Carver, 234 N.Y. 219, 137 N.E. 309	53
First National Bank of Belmont v. First National Bank of Ramesville, (Ohio) 50 N.E. 723	49
First National Bank v. Shewalter, (Mo.) 134 S.W. 12	62
First National Bank v. Smith, 65 N.W. 437	62
First National Bank v. Stewart, 107 U.S. 676, 27 L. Ed. 592	61
First University Investment Corp. v. Roosevelt Savings & Loan Assn., 170 Wash. 444, 16 P. 2d 820	46
Flannagin v. American Minerals Producing Co., 108 Wash. 569, 185 Pac. 609	46
Flannery v. Wilcuts, 25 F. 2d 951	54
Freeburg v. Stoddard, 28 Atl. 1111	49
Foreman v. Foreman, 251 N.Y. 237, 167 N.E. 428	48, App.-4
Frost v. Puget Sound Realty Assn., 57 Wash. 629, 107 Pac. 1029	47
Geddes v. Anaconda Mining Co., 254 U.S. 590	43

Guaranty Trust Co. v. Minneapolis & St. Louis R. Co., (C.C.A. 8) 36 F. 2d 747, cert. den. 281 U.S. 756	54
Hamburg Bank v. Onacheita National Bank, (C.C.A. 8) 78 F. 2d 100	57
Hartford-Connecticut Trust Co. v. Eaton, (C.C.A. 2) 34 F. 2d 128	73
Helvering v. Butterworth, 290 U.S. 365, 78 L. Ed. 365	66
Helvering v. Fitch, 309 U.S. 149, 84 L. Ed. 665	55
Holmes v. Holmes, 65 Wash. 572, 118 Pac. 733	48, App.-6
Huston v. Drake, (C.C.A. 9) 97 F. 2d 863	57
Irwin v. Gavitt, 258 U.S. 161, 69 L. Ed. 897	65
Jackman v. Continental National Bank, (C.C.A. 8) 16 F. 2d 728, 51 A.L.R. 336	62
Jensma v. Sun Life Assurance Co., 64 F. 2d 457	27
Jenison v. Commissioner, (C.C.A. 5) 45 F. 2d 4	73
Johnson v. Commissioner, (C.C.A. 8) 88 F. 2d 952, 955, 956	65
Korn v. Spokane Trust Co., (C.C.A. 9) 276 Fed. 68	47
Kuhn v. Princess Lida, (C.C.A. 3) 119 F. 2d 704	29
Lantry v. Wallace, 182 U.S. 536, 45 L. Ed. 1218	59
Latshaw v. Western Townsite Co., 91 Wash. 575	46-47
Letts v. Commissioner (C.C.A. 9) 84 F. 2d 760	65
Lucas v. Earl, 281 U. S. 111, 50 S. Ct. 241 74 L. Ed. 731	66
McKinnon v. Mosse, 177 Fed. 576	62
Massachusetts Bonding & Ins. Co., v. Hudspeth, 94 F. 2d 467	54
Mattern v. Commissioner, (C.C.A. 9) 61 F. 2d 663	66
Meeker v. Durey, (C.C.A. 2) 92 F. 2d 607	66
Mercy v. Hall & Son, Inc., 177 Wash. 338, 31 P. 2d 1009	46
Missouri Pac. Transp. Co. v. George, (C.C.A. 8) 114 F. 2d 757	26
Moses v. U.S., (C.C.A. 2) 61 F. 2d 791, cert. den. 289 U. S. 743	74
National Bank v. Matthews, 98 U. S. 621, 25 L. Ed. 188	62

New York Life Ins. Co. v. Gamer, 303 U.S. 161, 82 L. Ed. 726, 58 S. Ct. 500, 114 A.L.R. 1218	51
Oliver v. Bell, 103 F. 2d 760	28
O'Meara v. Commissioner, (C.C.A. 10) 34 F. 2d 390	48, App.-3
Oppenheimer v. Harriman National Bank, 301 U.S. 206, 81 L. Ed. 1042	61
Paul v. United Ry. Co., 152 Mo. App. 577, 134 S.W. 3	52
Penn v. Robertson, (C.C.A. 4) 115 F. 2d 167, 29 F. Sup. 386	57
Pearce v. Commissioner, 315 U.S. 543, 86 L. Ed. 1016	55
Peters v. Lohr, (S.D.) 124 N.W. 853	53
Phillip v. Schlager, 214 Wis. 370, 253 N.W. 394	54
Portland Cremation Assoc. v. Commissioner, (C.C.A. 9) 31 F. 2d 843	48, App.-1
Riker v. Commissioner, (C.C.A. 2) 42 F. 2d 150	65
Rogers Recreation Co. v. Commissioner, (C.C.A. 2) 103 F. 2d 780	73
Scarpelli v. Washington Water Power Co., 63 Wash. 18, 114 Pac. 870	53
Seaside Improvement Co. v. Commissioner, (C.C.A. 2) 105 F. 2d 990	52
Sewell v. U.S. (Ct. of Claims) 19 Fed Supp. 657	66
Shellebarger v. Commissioner (C.C.A. 7) 38 F. 2d 566	65
State Farm Mutual Automobile Ins. Co. v. Bonacci, et al, 8 Cir., 111 F. 2d 412	28
Steinberg v. U.S., (C.C.A. 2) 14 F. 2d 564	57
Storley v. Armour & Co., (C.C.A. 8) 107 F. 2d 499	26
Sullivan v. Associated Dealers, 4 Wn. (2d) 352, 103 P. 2d 489	53
Sundt v. Turman Oil Co., (C.C.A. 5) 107 F. 2d 762	28
The Seattle, (C.C.A. 9) 170 Fed. 284	61
Title Guarantee Loan & Trust Co. v. Commissioner, (C.C.A. 5) 63 F. 2d 621	66
Tootle v. First National Bank, 6 Wash. 181, 33 Pac. 345	47
Tucker v. Brown, 199 Wash. 320, 92 P. 2d 221	48, App.-5

Union Fruit Producers v. Plumb, 1 Wn. (2d) 378, 95 P. 2d 1033	46
U. S. v. Sullivan, 274 U.S. 259, 71 L. Ed. 1073, 54 A.L.R. 1020	57
U. S. v. Arnold, (C.C.A. 3) 89 F. 2d 246	65
U. S. v. Spaulding, 97 F. 2d 701	66
U. S. v. National City Bank, 21 Fed. Supp. 791	73
U. S. v. Bertelsen & Peterson Engineering Co., 306 U.S. 276, 83 L. Ed. 647, affirming 97 F. 2d 488 and 98 F. 2d 132	74
U. S. v. Piedmont Manufacturing Co., (C.C.A. 4) 89 F. 2d 296, affirming 15 Fed. Supp. 581	74

STATUTES AND TEXTS CITED

13 Am. Jur., sec. 759, p. 790	47
9 C.J. 542-3, sec. 45	49
22 C.J. 220, sec. 193	44
9 C.J.S. 1220, 1243, sec. 664	62
12 C.J.S. 74, sec. 29	49
Federal Rules of Civil Procedure, 28 U.S.C.A. Rule 52 (a)	25
Federal Rule 8c	57
26 R.C.L. 1182	48, App.-3
1 Restatement, Trusts, sec 8 and 24	48
2 Restatement, Trusts, sec. 448	42
1 Scott, Trusts, sec. 8, p. 65	48
1 Scott, Trusts, sec. 12. 10, p. 104	42
1 Scott, Trusts, sec. 96. 3, p. 509	46-47
12 U.S.C.A. 24 (7)	58
12 U.S.C.A. 83	59
12 U.S.C.A. 93	62
26 U.S.C.A. 293b	71
26 U.S.C.A. 1112	73
28 U.S.C.A. sec. 41 (20)	74

Williston on Contracts (Rev. Ed.)	
Vol. 1, p. 787, sec. 271	58
Vol. 6, p. 5027, sec. 1770	58
Watkins v. Prudential Insurance Co., 315 Penn. 497,	
173 Atl. 644, 95 A.L.R. 869	54
Weiget v. Becker, (C.C.A. 8) 84 F. 2d 706	54
Welch v. Helvering, 290 U.S. 111, 78 L. Ed. 212	56
White v. Miners National Bank, 102 U.S. 658,	
26 L. Ed. 250	49
White v. Ross, (C.C.A. 5) 73 F. 2d 236	66
Wickwire v. Reinecke, 275 U.S. 101, 72 L. Ed. 184	56
Wittmayer v. U.S. 118 F. 2d 808	25
112 West 59th Street Corporation v. Helvering,	
C.A.D.C.) 68 F. 2d 397	63

JURISDICTIONAL STATEMENT

This is an action against the United States to recover deficiency assessment of income tax and excess profits tax illegally imposed by the Commissioner of Internal Revenue and paid by plaintiff. The District Court had jurisdiction under the Tucker Act and the Internal Revenue Code. Title 28 U. S. C. A. sec. 41 (20) and Title 26 U. S. C. A. sec. 3772. It is undisputed that the Collector of Internal Revenue who received the payment was no longer in office at the time of commencement of the action. (Tr. 3, 14, 16, 17, 495)

The case also comes within the usual appellate jurisdiction of this Court upon appeal from final judgment of District Court in such tax cases. Title 28 U. S. C. A. sec. 225, 226, 765, 875.

STATEMENT OF THE CASE

This is an action brought by Guaranty Trust Company, a corporation, as liquidating trustee of Yakima Holding Corporation, a corporation, against the United States under the Tucker Act and the Internal Revenue Code to recover a refund of the sum of \$26,933.86, together with interest and costs, the same having been paid to the government on May 27, 1938, pursuant to deficiency assessment made by the Commissioner of Internal Revenue as to the 1935 income tax and excess profits tax of said Yakima Holding Corporation.

The District Court entered judgment for plaintiff in the sum of \$12,793.04, together with interest and costs. (Tr. 498) Each party has appealed, and we shall therefore designate them as plaintiff and defendant, respectively, as they appeared in the District Court. We shall also for brevity refer to Yakima Holding Corporation as the Holding Company and to Yakima First National Bank as the Bank.

The basic question is whether the profit realized in April 1935 from the sale of 11,000 shares of stock of Sunshine Mining Company was properly taxable to the Bank as contended by plaintiff or to the Holding Company as contended by defendant. The stock in question consists of two blocks, one consisting of 7500 shares purchased in August 1934, and sold in April 1935, and the second consisting of 5000 shares purchased from Alexander Miller in December 1934, of which 3500 shares were sold in April

1935, and the remaining 1500 shares were retained by the Bank until 1938. The Commissioner also levied, and plaintiff paid, a 50% fraud penalty.

The District Court after a non-jury trial held that the profit on the 7500 shares was taxable to the Holding Company, but that the profit on the sale of the 3500 Miller shares was properly taxable to the Bank and not to the Holding Company; and that plaintiff was therefore entitled to recover back the tax based on the profit from the sale of the 3500 shares and also the entire fraud penalty, which the court held was improperly assessed.

It is our contention that both the 7500 and the 5000 share blocks of Sunshine stock were held by the Holding Company in trust or as agent for the Bank, and that the profit on the sale thereof was therefore taxable to the Bank as the beneficial owner thereof and not to the Holding Company.

The facts are not substantially in dispute and may be summarized as follows:

During the years in question, 1934 and 1935, Yakima Holding Corporation was a holding corporation owning practically all of the stock of Yakima First National Bank, First National Bank of Wapato, and the majority of the stock of Guaranty Trust Company. Yakima First National Bank and Guaranty Trust Company had adjoining but entirely separate places of business in the city of Yakima. R. M. Hardy was President and Manager of said Bank and

President of the Holding Company. George H. Bradshaw was Secretary and Manager of Yakima Holding Corporation and Guaranty Trust Company. The only office of the Holding Company and Mr. Bradshaw was in the Guaranty Trust Company's place of business. (Tr. 5, 16, 91, 92, 115-118, 143, 155)

Several years previously during the depression, Yakima National Bank had taken over and merged with the First National Bank of Yakima to form the Yakima First National Bank. The First National Bank was in shaky condition and had numerous assets of doubtful value, which were severely criticized by the national bank examiners. At the time of the merger the bank examiners agreed with Mr. Hardy that he might have five years to work out the doubtful assets. Alexander Miller, a wealthy citizen of Yakima, was a large stockholder in the First National Bank and was naturally grateful to avoid a bank stockholders' assessment. Mr. Miller was also the Treasurer of Sunshine Mining Company and a stockholder in the Holding Company. (Tr. 97-101, 144)

The continuance and increased severity of the depression, however, made the working out of the doubtful assets extremely difficult. Although the agreed five year period had not expired, the national bank examiners repeatedly urged the Bank and Mr. Hardy, its President, to obtain \$200,000 cash from the Reconstruction Finance Corporation through the issuance to it of preferred stock with the view

of improving the financial condition of the bank and avoiding impairment of its capital. The bank, however, although at one time making such application to the R. F. C., preferred to retain its independence and not to issue such preferred stock. (Tr. 97-100, 220, 246)

In August 1934 Mr. Hardy was also President of Sunshine Mining Company and negotiations were pending for the listing of its stock on the New York Curb Exchange and later the New York Stock Exchange. It was then apparent to Mr. Hardy and the other officers of the Bank that the market value of stock in Sunshine Mining Company was going to increase very substantially. This presented an obvious and effective method of improving the Bank's financial condition so that the doubtful assets could be charged off, the national bank examiners satisfied, and the necessity for issuing preferred stock to the R. F. C. avoided. However, it was apparent that the Bank could not directly purchase and pay for Sunshine Mining stock in its own name, in view of the limitation upon the statutory powers of national banks.

Accordingly, in August 1934 it was definitely orally agreed between the Bank and the Holding Company through their respective officers, directors, and executive committees that the Holding Company would purchase and pay for 7500 shares of Sunshine stock and was to hold the same in trust for and on behalf of said Bank and that the Bank and not the Holding Company was to be at all times the

sole beneficial owner and holder thereof; that at the time of the future sale of said stock the Bank was to pay the Holding Company the actual cost of said stock plus a reasonable "appreciation write-up" as compensation for its services and that in the meantime the Holding Company should receive and retain the dividends paid thereon as further compensation for its services; and that if any loss resulted from the purchase and sale of said stock the loss would be borne entirely and exclusively by the Bank and it would reimburse the Holding Company therefor; and that if any profit resulted therefrom, as it was believed was almost certain to occur, the entire profit therefrom, less the said "write-up" and dividends, would inure and accrue to and for the Bank and would be paid to it, and said profits would be the property of the Bank entirely and exclusively.

This agreement is shown by the uncontradicted evidence of Messrs. Hardy, Rightmire, and Crawford, three officers of the Bank. (Tr. 82-89, 93-97, 143, 156-159, 164-5, 170-1) Mr. Miller and Mr. Bradshaw died prior to the trial. (Tr. 40, 41)

In August 1934 pursuant to this oral agreement the Holding Company purchased 7500 shares of Sunshine stock and paid the purchase price thereof in the sum of \$59,576.50. [The Holding Company was then indebted to the Bank in the sum of \$60,000, and at that time the Holding Company received \$75,000 in cash from Mr. Hardy in payment of a loan which he owed the Holding Company. Stock certificates

for 2500 shares were issued in the name of George H. Bradshaw, the Secretary and Manager of the Holding Company, and also a director and member of the executive committee of the Bank, as a "street name", and certificates for the other 5000 shares were issued to and in the name of Yakima First National Bank. (Pl. Ex. 1, 5; Tr. 25, 256, 267) All of these stock certificates were held in the possession of the Bank.

In the early part of December 1934 or prior thereto there were a number of conversations whereby it was agreed between Mr. Alex Miller, the Bank, and the Holding Company, that Miller would transfer and exchange to the Holding Company 5000 shares of Sunshine stock on the basis of \$12.00 per share, for 4000 shares of Yakima Holding Corporation stock on the basis of \$15.00 per share, to be transferred from the Holding Company to Miller; and that the Holding Company would receive said Sunshine stock wholly as trustee and agent for the Bank and that the entire transaction was solely and directly for the benefit of the Bank. As hereinabove stated, Mr. Miller was a large stockholder in First National Bank which had been merged into Yakima First National Bank, as well as a man of considerable wealth, and he was very desirous of assisting the Bank to rectify its impaired capital position. (Tr. 101-106, 120, 121, 144)

The testimony of Mr. Hardy is undisputed:

"Mr. Miller had originally on a number of occasions offered to sell to the Bank some Sunshine Mining stock

at a low price. I explained to Mr. Miller that the Bank couldn't buy it. This deal was finally worked out and handled thru the Holding Corporation.

Q For what purpose?

A *For the benefit of the Bank.*" (Tr. 144)

This transaction was further evidenced by the following three letters signed and delivered by said parties on December 11, 1934:

"Yakima Holding Corporation

December 11, 1934

"Mr. Alex Miller
Yakima, Washington.

Dear Sir:

"Referring to conversations which we have had recently regarding an exchange of some stock of the Yakima Holding Corporation for stock of the Sunshine Mining Company, I wish now to make the definite proposition that we will exchange four thousand shares of Yakima Holding Corporation stock for five thousand shares of Sunshine Mining Company stock. This is putting a value of \$15.00 per share on the stock of the Holding Company and \$12.00 per share on the stock of Sunshine.

Yours very truly,

GEO. H. BRADSHAW
Secretary

GHB:M

Ap. 25.35

Delivered Sunshine Cert. for
5000 shares to Mr. Hardy
GHB"

(Pl. Ex. 16, Tr. 312)

Mr. Miller on the same date replied thereto by letter reading as follows:

"December 11, 1934

"Mr. Geo. H. Bradshaw, Secretary,
Yakima Holding Corporation,
Yakima, Washington.

Dear Sir:

"Referring to your letter of this date, in which you offer to exchange four thousand shares of Yakima Holding Corporation stock for five thousand of Sunshine Mining stock, I wish to advise you of my acceptance of this offer of exchange.

Yours very truly,

ALEX MILLER"

(Pl. Ex. 17, Tr. 313)

On the same date Mr. Miller delivered to Guaranty Trust Company to hold in escrow certificate for five thousand shares of Sunshine stock, together with escrow letter reading as follows:

"December 11, 1934

"Guaranty Trust Company,
Yakima, Washington

Gentlemen:

"I am handing you herewith a certificate for five thousand shares of the stock of the Sunshine Mining Company, which I authorize you to deliver to the Yakima Holding Corporation in exchange for a certificate for four thousand shares of its capital stock.

"I wish, however, to make it a condition that this exchange will not be completed unless a sum sufficient to make the total of new money to be provided for the Yakima Holding Corporation equals a sum of at least \$200,000.00, and to be completed by March 1, 1935.

Yours very truly,

ALEX MILLER"

(Pl. Ex. 18, Tr. 314)

It is undisputed that the condition imposed in the last paragraph of this letter was later waived by Mr. Miller. (Tr. 105, 106) The Holding Company did not have the 4000 shares of its stock readily available at that time and therefore the 5000 shares of Miller's Sunshine stock remained in escrow in the possession of Guaranty Trust Company until the same was sold in the latter part of April 1935 as hereinafter stated. (Tr. 147) In December 1934 the market value of the Holding Company stock was greatly less than \$15.00 per share. (Tr. 124)

On the following day, December 12, 1934, the oral agreement with reference to the 7500 shares was confirmed in writing by the very important Plaintiff's Exhibit 19, (Tr. 47, 315) a letter written on that date by Mr. Bradshaw, Secretary and Manager of the Holding Company, to the Bank, reading as follows:

"Yakima Holding Corporation
Capital Paid in \$1,400,000.00
R. M. Hardy, President
Alex Miller, Vice Pres.
Geo. H. Bradshaw, Secretary
A. E. Larson, Treasurer
Yakima, Washington

December 12, 1934

"Yakima First National Bank
Yakima, Washington

Gentlemen:

"In order to confirm an understanding we have had with the bank regarding the purchase of 7500 shares

of Sunshine Mining Company stock, I thought it advisable to write this letter. It was understood that this stock was to be purchased by the Yakima Holding Corporation and held by it for the account of the bank. The Yakima Holding Corporation was to be reimbursed for the amount actually paid for the stock, plus a small appreciation to be determined at the end of the year if this should be deemed necessary. We, therefore, treated this stock as being held for the bank, and if any loss results it is to be the loss of the bank and, of course, if any profit results it will likewise accrue to the bank.

"I am taking this opportunity also of setting out the understanding reached in connection with the proposal submitted by us to Mr. Alexander Miller to exchange 4000 shares of stock of the Yakima Holding Corporation for 5000 shares of stock of the Sunshine Mining Company. We are doing this on the express understanding that stock of the Sunshine Mining Company will be taken over by the bank at the stipulated price of \$12.00 per share. This understanding is to apply to any further similar transactions.

"I would ask you to signify that this is also in accordance with your understanding of these transactions by signing the acknowledgment on the bottom of this letter.

Yours very truly,
GEO. H. BRADSHAW
Secretary

GHB:M

"The above represents the understanding that has been reached between the bank and the Yakima Holding Corporation with respect to the matters set out above, and the same is hereby approved.

YAKIMA FIRST NATIONAL BANK
By H. F. CRAWFORD
Cashier"

At the request of Mr. Hardy the foregoing letter was

approved in writing on behalf of the Bank by its cashier Mr. Crawford, for the reason that he was the only officer of the Bank who was in no way connected with the Holding Company.

Although Mr. Bradshaw and Mr. Miller died prior to the trial, the testimony of Mr. Hardy, Mr. Rightmire and Mr. Crawford is definite, positive and unequivocal that this letter was actually written and signed on the date that it bears, December 12, 1934. The testimony is further undisputed that the letter was signed, approved and delivered before Mr. Miller left about the middle of December to spend the winter in California where he remained until the following spring. (Tr. 82-89, 106-107, 142, 157-8, 164-5, 244)

These two transactions were further confirmed by the minutes of the Holding Company executive committee meeting on April 12, 1935, which read in part as follows:

"A meeting of the executive committee of the Yakima Holding Corporation was held in the office of the Yakima First National Bank on Friday, April 12, 1935, at 3:00 P. M.

"There present Messrs. Hardy, Bradshaw, Rightmire and Clift.

"Mr. Hardy stated there were several matters that required action by the executive committee and stated that the first matter was a proposal to Mr. Alex Miller to exchange 4000 shares of stock of the Yakima Holding Corporation for 5000 shares of Sunshine Mining Company stock on the basis of placing a value of \$15.00 per share on the stock of the Holding Corporation and \$12.00 per share on the stock of the Sunshine Mining

Company. This proposal was made to Mr. Miller under date of December 11, 1934 and accepted by him. It was then moved by Mr. Clift, seconded by Mr. Rightmire, that we approve and ratify the proposal for the exchange of stock as outlined and authorize its completion. Carried.

"The secretary then stated that at the time this transaction with Mr. Miller was discussed by the officers an understanding was reached that if the transaction were completed that the Yakima First National Bank would take over from the Yakima Holding Corporation the 5000 shares of Sunshine at \$15.00 per share; also the 7500 shares of Sunshine stock already owned by the Yakima Holding Corporation at the cost price of same, all in accordance with a letter setting out this understanding dated December 12, 1934 from the secretary to the bank and approved by the bank.

"It was then moved by Mr. Rightmire, seconded by Mr. Clift, that the arrangement between the Holding Corporation and the Bank as outlined by the secretary be approved and ratified, which motion being put was unanimously approved.

"The secretary then pointed out that it would be necessary to issue some new stock to Mr. Miller in fulfillment of the transaction and that inasmuch as the price fixed for the sale of capital stock had been previously fixed at \$20.00 per share, it would be necessary to have a resolution approving the issuance of any new stock at \$15.00 per share. It was then moved by Mr. Bradshaw, seconded by Mr. Rightmire, that in order to consummate certain plans of reorganization that had been under consideration by the officers of the company for some time that it was necessary that some additional stock of the corporation be disposed of and that in view of changed economic conditions it would be necessary to fix a lower price than the \$20.00 per share provided for in previous issues of stock and that we now authorize the issuance of such additional stock as may be necessary to complete the transaction with Mr. Miller at a price of \$15.00 per share, and also authorize the dis-

posal of such other stock as may be necessary to carry out the contemplated plans of reorganization at a price of \$15.00 per share. This motion being put was unanimously approved."

(Pl. Ex. 15, Tr. 167, 308)

It is undisputed that the use of the figure \$15.00 per share in reference to the said 5000 shares of Sunshine stock was due to inadvertent mistake, the correct amount being \$12.00 per share, and the Miller transaction was carried out on that basis. (Tr. 488)

As to the 5000 shares no entry whatever was made on the Holding Company's books until the exchange was actually consummated and the stock sold in April 1935. Mr. Miller continued to receive the dividends thereon. (Tr. 183) The Holding Company never received any dividends, income or profit whatsoever therefrom. (Tr. 183) The entire profit realized from the sale thereof was paid to the Bank. Said Miller stock was never in the possession of the holding company.

For obvious reasons, in view of the limitations in the national bank statutes, no entries were made in the books and records of the Bank until the stock was sold. At that time all of the profit on the sale of the stock was actually received and retained by the Bank. (Tr. 64-69, 78, 79, 139, 141, 248-9) The records of the Bank so showed, and the Bank reported the full amount of profit as income in its 1935 income tax return. (Pl. Ex. 26, Tr. 327, 351) These matters were discussed at several meetings of the executive

committee of the Bank, but as was the custom, no minutes were kept of such meetings. (Tr. 134)

Pursuant to the original oral agreement, the Holding Company received and retained for its services in connection with the matter the dividends amounting to \$1500 paid upon the 7500 shares of Sunshine stock. Also pursuant to the original oral agreement the Holding Company received as compensation an "appreciation write-up" in the sum of \$1875, being at the rate of 25c per share on the 7500 shares. Entry thereof was made on the Holding Company books on January 6, 1935. (Tr. 122, 129, 149, 159) The market value of the stock at that time of course had advanced much more than that amount. The Holding Company was actually paid this amount out of the proceeds of the sale of the stock at the time of the sale. (Tr. 202, 317) The Holding Company reported in its 1935 income tax return the said \$1500 dividend it received and the \$1875 "appreciation write-up" or compensation received by it. (Pl. Ex. 28, Tr. 367, 387, 390, 392) With that exception the full amount of the profit realized on both of these stock transactions was actually received by the Bank and was reported by it in its 1935 income tax return. (Pl. Ex. 26, Tr. 327, 351)

The entries in the Holding Company books with reference to the 7500 shares, as stated in the findings of fact entered by the District Court, "have as specifically designated items on the ledger page the initials Y. F. N. B. for the description of the number of shares and the price paid

for each share." (Tr. 488) This designation of course referred to Yakima First National Bank as the beneficial owner of the stock. (Tr. 33, 35, 36, 118, 193-5, 202-205, 254, 284)

In the latter part of April 1935, the market value of the stock having greatly advanced, and the bank examiner having continued to urge that the financial affairs of the Bank be promptly placed in better condition, 11,000 shares of the 12,500 shares in question were sold for the total sum of \$199,225.45. For that purpose all of the stock certificates were *delivered by the Bank* to Drumheller, Ehrlichman & White, a Seattle stock brokerage concern, having a branch office at Yakima. Payment for the stock was made by Drumheller *directly to the Bank*. (Tr. 64-69, 78-9, 107, 108, 135, 141) It is undisputed that if the Holding Company had been the owner of the stock, in accordance with its uniform custom and practice it would have sold the stock through Guaranty Trust Company, where it had its office. (Tr. 115-118) However, this was not done, and the stock was delivered and sold by the Bank. The stock was property of the Bank, and not of the Holding Company. (Tr. 107, 108, 114, 115, 124, 128, 131, 135, 254)

(The selling price of the 7500 shares was \$135,835.54. The cost of this stock to the Bank, including the \$1875 "appreciation write-up" or compensation paid by the Bank to the Holding Company, was \$61,451.50, making a gross profit in the sum of \$74,384.04 received and retained by the Bank as to the 7500 shares.

At the same time at the request of the Bank Drumheller sold 3500 shares of the 5000 shares of Miller stock for \$63,389.91, net proceeds of sale; the cost or purchase price thereof was \$42,000, leaving a profit on the 3500 shares in the sum of \$21,389.91. The remaining sum of \$77,773.95 was retained by the Bank and reported in its 1935 income tax return. (Tr. 320, 324, 327, 351) The remaining 1500 shares of Sunshine stock were *redelivered by the brokers to the Bank and retained by it* until later sold in 1938. (Tr. 57, 64, 320) Later in 1935 the Bank was sold to the National Bank of Commerce of Seattle. (Tr. 89)

It is undisputed that none of the stock involved in either transaction ever stood in the name of the Holding Company. Tr. 25, 256, 257) The 5000 Miller shares were transferred directly from Miller to the Bank. (Pl. Ex. 2, Tr. 25, 257)

Out of the proceeds of the sale in April 1935, the Bank paid Miller for the 5000 shares of Sunshine stock at the agreed basis of \$60,000 and the Bank paid the Holding Company the amount which the latter had paid for the 7500 shares and the 25c per share "appreciation write-up" thereon, in the total sum of \$61,451.50, all in accordance with the oral agreement of August 1934 and the written agreement of December 12, 1934. (Tr. 317, 491) The income or profit on all of the stock, both the 7500 block and the 3500 block, was actually received and retained by the Bank and was reported by it in its 1935 income tax return. (Tr. 64-69, 7819, 233, 320, 324, 327, 351) The agreement was actually carried out and performed in accordance with the letters

of December 11 and 12, 1934. (Tr. 143, 315)

With reference to the Miller transaction, the evidence clearly establishes, and the District Court made further findings as follows:

"The transaction with Alex Miller with reference to the 5000 shares of Sunshine stock was originally in December, 1934, and at all times, made, agreed upon, consummated and put through for the benefit of the Bank. The reason for the method used in handling the transactions was that the parties realized the restrictions upon national banks in the purchase of stock in corporations. The transactions were not handled in that manner in order to evade or reduce payment of income taxes of either the Bank or the Holding Company.

"The court finds that the said 5000 shares of Sunshine stock was acquired from Alex Miller for the Bank, and the Holding Company acted in a trust capacity for, or as agent of, the Bank and that at all times until the sale thereof the actual, equitable and beneficial owner and holder of the said 5000 shares of Sunshine stock was the Yakima First National Bank and was not the Holding Company." (Tr. 492)

With reference to the 50% fraud penalty, the District Court made the following findings:

"That there was no fraud or bad faith on the part of any of the said corporations or their officers or agents with reference to any of the transactions involved herein, and no fraud or bad faith in making any of the income tax returns of any of said corporations for the year 1935. At the time the said income tax returns for 1935 were made, the Holding Company, its officers and agents, did not know that it owed any taxes upon income derived from any of the transactions involved herein, and bona fide believed that all of the profit belonged to the Bank, and said taxpayer did not fraud-

ulently or knowingly fail to report any income or profit derived from any of the transactions involved herein. That by reason thereof, no fraud penalty could properly be assessed against any of said corporations, including the Holding Company, with reference to any of the transactions involved herein. There was no wrongdoing on the part of any of the said corporations, including the Holding Company, or its officers or agents, in connection with any of the transactions involved herein, and there was no purpose or intention on the part of the Holding Company or its officers or agents or any of the corporations referred to herein to evade any tax believed by said parties to be owed to the defendant; and there was no fraudulent intent whatsoever by any of said parties with reference thereto." (Tr. 493)

It is admitted by the pleadings that thereafter in 1937 the Commissioner of Internal Revenue made a deficiency assessment against plaintiff for 1935 income and excess profits taxes in the sum of \$16,515.51, plus 50% fraud penalty thereon in the sum of \$8,257.76, or a total of \$24,773.27. Plaintiff made written sworn protest and presented affidavits, but the protest was denied. On May 27, 1938, plaintiff paid defendant the said sum of \$24,773.27 plus interest thereon in the sum of \$2160.59 to said date, or a total payment of \$26,933.86. Thereafter plaintiff filed claims for refund, which were denied. (Tr. 11, 17, 494)

The foregoing statement of the case closely follows the findings of fact entered by the District Court (Tr. 480) and is clearly supported by the evidence, which in practically all respects is undisputed.

As hereinabove stated, the court held in favor of the

defendant as to the profit on the 7500 shares and in favor of the plaintiff as to the profit on the 3500 Miller shares and as to the fraud penalty, and entered judgment in favor of plaintiff for \$12,793.04, together with interest and costs, (Tr. 498) from which both parties have appealed. (Tr. 499, 505)

SPECIFICATION OF ERRORS

The District Court erred:

1. In making finding of fact No. 10 (Tr. 489), the same being merely an erroneous conclusion as to the 7500 share transaction.

2. In making finding of fact No. 27 (Tr. 495), as the same erroneously disallows recovery as to the 7500 share transaction.

3. In making conclusion of law No. 2 (Tr. 497), as the same erroneously disallows recovery as to the 7500 share transaction.

4. In making conclusion of law No. 3 (Tr. 497), as the same erroneously disallows recovery as to the 7500 share transaction.

5. In entering judgment in favor of the plaintiff for only the sum of \$12,793.04, together with interest and costs (Tr. 498), in that said recovery is inadequate because the same does not include recovery as to the 7500 share transaction.

6. In failing and refusing to enter judgment in favor of the plaintiff for the full amount sued for, to-wit, \$26,933.86, together with interest and costs. (Tr. 15)

7. In holding that said 7500 shares of Sunshine stock were not purchased and held by the Holding Company as trustee or agent for the Bank, and that the equitable and beneficial owner thereof was the Holding Company, and that the entire profit thereon was taxable to the Holding Company and not to the Bank, and in holding and concluding that plaintiff is not entitled to recover herein the tax paid based on the profits from the sale of said 7500 shares of Sunshine stock.

8. In failing and refusing to hold that plaintiff is entitled to recover herein, in addition to the amount of the judgment entered, all taxes and interest paid by virtue of the profits on the sale of said 7500 shares of Sunshine stock.

ARGUMENT

1.

SUMMARY OF ARGUMENT

Our position in this case is clear, simple and well founded upon undisputed evidence. Not only the Miller 5000 shares of Sunshine stock, but also the 7500 shares, were purchased by the Holding Company as agent for and held in trust for the Bank. The sole, equitable, beneficial owner thereof, the cestui que trust was the Bank. If the Holding Company had any title at all to the stock, it was solely a

bare legal title as trustee for the Bank. The Holding Company having advanced out of its own funds the purchase price of the stock as to the 7500 shares, was of course entitled to be reimbursed by the Bank for the funds so advanced, and naturally the stock was being held as security for such repayment.

The whole question in this case is: Could the Holding Company in May 1935 or thereafter have recovered this profit from the Bank? The answer is obvious. It could not. The Holding Company was bound morally, equitably and legally by its solemn agreement, both oral and in writing, that the stock should be held in trust for the Bank and that the Bank should be and was the sole, equitable and beneficial owner thereof and that the Bank was entitled to the profit realized therefrom. The agreement was undoubtedly valid and binding upon the Holding Company. Being valid and binding upon the taxpayer, it is elementary that the same was valid and binding upon the government for tax purposes. The same was therefore properly reported as income of the Bank and not income of the Holding Company.

It never was and never was intended to be income of the Holding Company, and therefore was not properly taxable as such. It never was received by the Holding Company. It never was claimed by the Holding Company. It was received and retained by the Bank. Everyone at all times

agreed and recognized that the Bank was the owner and entitled to the profit so realized.

If as we contend and as we believe the evidence conclusively establishes, both the 7500 shares and the 5000 Miller shares were held in trust for the Bank, then it necessarily follows, and is we believe undisputed, that plaintiff is entitled to recover herein the full amount sued for, \$26,933.86, together with interest and costs, the same being the amount of taxes and penalty illegally assessed and collected by the Commissioner from the plaintiff.

Stipulation has been filed, approved by this court, for consolidation of these two appeals for argument in the briefs and otherwise. The greater portion of this brief will discuss our appeal, but at the close thereof we shall briefly discuss the questions presented upon defendant's appeal relative to the Miller stock and the fraud penalty. Most of the argument herein is applicable to both the 7500 share and the 5000 share transactions.

2.

EFFECT TO BE GIVEN TO DISTRICT COURT'S FINDINGS OF FACT

An extremely important preliminary question, applicable to both appeals, relates to the effect to be given to the findings of fact entered by the District Court. (Tr. 480) The District Court had the supreme advantage of seeing and hearing the witnesses testify and observing their de-

meanor on the witness stand, which of course is wholly impossible for this court in judging the case upon the cold printed record.

Every finding of fact made by the District Court as to both the 7500 share and 5000 share transactions is favorable to the plaintiff with the single exception of finding No. 10 which is purely a conclusion (that the profit on the 7500 shares constituted income of the Holding Company) and the amount of recovery stated in finding No. 27 which is likewise purely a conclusion. As previously stated, the foregoing statement of the case herein is taken largely from the court's findings of fact.

The two following rules as to the effect to be given to the findings of the trial court are well settled:

1. Findings of fact entered by the trial court relative to the basic facts themselves will not be set aside if supported by substantial evidence.

2. Findings of fact which are actually mere inferences or conclusions are not binding upon the appellate court and will be set aside if erroneous.

Each of these principles is directly applicable here. As to the facts themselves, all of the findings of fact entered by the trial court are, to say the least, supported by more than substantial evidence. As a matter of fact they are supported by overwhelming, undisputed evidence. Consequently those findings as to the facts cannot be set aside or reversed by this court.

On the other hand, those findings which actually are merely conclusions and inferences of the district court, namely, the conclusion that the profit on the sale of the 7500 shares was taxable to the Holding Company and not to the Bank and constituted income of the Holding Company and not the Bank, are not binding upon this court. The conclusions of the district court as to the 7500 shares are clearly erroneous and therefore should be reversed.

Rule 52(a) of the Federal Rules of Civil Procedure, 28 U. S. C. A. following sec. 723c, contains the following provision:

"Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

In the recent case of *Wittmayer v. United States*, 118

F. (2d) 808, this court said:

"After a careful examination of the record we are unable to say that the Court's findings are clearly erroneous. Rule 52(a), Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c. . . .

"The findings of the trial Court fall within the familiar rule, that where based upon conflicting evidence they are presumptively correct, and unless some obvious error of law, or mistake of fact, has intervened, they will be permitted to stand. Silver King Coalition Mines Co. v. Silver King C. M. Co., 8 Cir., 204 F. 166, 177, Ann. Cas. 1918B, 571.

"The provisions of the new procedural rules that the findings of fact of the trial judge are to be accepted on appeal unless clearly wrong (Rule 52(a), 28 U. S. C. A. following section 723c), is but the formulation of

a rule long recognized and applied by courts of equity. *Guilford Const. Co. v. Biggs*, 4 Cir., 102 F. (2d) 46, 47.

“As was said by Mr. Justice Holmes in *Adamson v. Gilliland*, 242 U. S. 350, 353, 37 S. Ct. 169, 170, 61 L. Ed. 356 (citing *Davis v. Schwartz*, 155 U. S. 631, 636, 15 S. Ct. 237, 39 L. Ed. 289), the case is pre-eminently one for the application of the practical rule, that so far as the findings of the trial judge who saw the witnesses ‘depends upon conflicting testimony or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable.’ ”

In *Missouri Pac. Trans. Co. v. George*, (C. C. A. 8) 114

F. (2d) 757, the court said:

“The findings are based upon conflicting testimony. The appellants’ contention is that the quoted finding is not supported by a preponderance of the evidence. We have examined the evidence, and *the quoted finding is supported by substantial evidence. It is not, therefore, clearly erroneous. It can not for that reason be set aside by this court.* Rule 52(a), Rules of Civil Procedure.”

In *Storley v. Armour & Co.*, (C.C.A. 8) 107 F. (2d) 499, 513, Judge Sanborn speaking for the court said:

“The plaintiffs, in appealing, seem to have assumed that this Court, the jurisdiction of which is appellate, would, in effect, retry the issues which were tried in the court below and would substitute its judgment as to damages for that of the trial court. This is a misconception. It is not the function of this Court to retry this case and to pass upon questions of fact the determination of which depended upon the credibility of witnesses and the weight of evidence, or to substitute its judgment for that of the trier of the facts which had reached permissible conclusions. See *Helvering v. Johnson*, 8 Cir., 104 F. (2d) 140, 144, and cases cited, and Rule 52(a) of the Rules of Civil Procedure

for the District Courts of the United States, 28 U. S. C. A. following section 723c."

In *Jensma v. Sun Life Assurance Co.*, 64 F. (2d) 457, this court said:

"The appellees concede that even in a case of this character the appellate court had the power to consider the evidence, but insist that *such examination must not go farther than to inquire 'whether there is any evidence to support the findings and whether the findings support the judgment.'*

"*This is unquestionably the law. In Dooley v. Pease*, 180 U. S. 126, 131, 132, 21 S. Ct. 329, 331, 45 L. Ed. 457, the court said:

'Where a case is tried by the court, a jury having been waived, its findings upon questions of fact are conclusive in the courts of review, it matters not how convincing the argument that upon the evidence the findings should have been different. *Stanley v. Supervisors* (of Albany County), 121 U. S. 547, 7 S. Ct. 1234, 30 L. Ed. 1000, 1002.

'Errors alleged in the findings of the court are not subject to revision by the circuit court of appeals, or by this court, if there was any evidence upon which such findings could be made.' (Citing numerous cases.) . . .

"We will therefore test the foregoing finding No. IV according to the rule laid down in section 875, *supra*; namely, 'when the finding is special the rule may extend to the determination of the sufficiency of the facts found to support the judgment.' We will also inquire whether, under the undisputed testimony, there was any substantial evidence upon which the lower court might have based an assumption that the infection from which the insured died was caused by other than 'external means.' Finally, we will endeavor to determine whether, as a matter of law, the finding

of the lower court, on its face, does not establish the fact that the 'means' were 'accidental'."

See also to the same effect:

Sundt v. Turman Oil Co., (C. C. A. 5), 107 F. (2d) 762, 764, and cases cited;

Crowell v. Baker Oil Tools, (C. C. A. 9), 99 F. (2d) 574, 577, and cases cited;

Clarke & Wilson Lumber Co. v. McCallister, (C. C. A. 9), 101 F. (2d) 709, 714;

State Farm Mutual Automobile Ins. Co. v. Coughran, (C. C. A. 9), 92 F. (2d) 239;

Oliver v. Bell, 103 F. (2d) 760;

American Home Fire Ins. Co. v. Hargreaves, 109 F. (2d) 86.

The following authorities, among many others, discuss both of the rules hereinabove referred to:

In *Campana Corporation v. Harrison*, (C. C. A. 7), 114 F. (2d) 400, 405, also a tax case, the court said:

"In the application of Federal Rule 52 it is the following principle that guides this Court: the reviewing court does not review the evidence as an original fact finding tribunal; it does not attempt to settle conflicts in evidence or to determine questions of credibility. In *re Duvall*, 7 Cir., 103 F. (2d) 653, 655; *Guilford Const. Co. v. Biggs*, 4 Cir., 102 F. (2d) 46, 47. Of course Federal Rule 52 does not require us to accept fact findings unsupported by the evidence. Nor does this Rule require us to respect conclusions of law which do not rest properly on the facts so found. It is certain that the principle giving the above described weight to the trial court's findings of fact, does not compel the reviewing court to give any specific weight to the trial court's conclusions of law, as it yet remains the duty

of the appellate court to decide whether the correct rule of law has been applied to the facts found. Whether special findings are supported by the evidence or whether they give the requisite support to conclusions rendered thereon, are questions open to consideration here."

In *Kuhn v. Princess Lida*, (C. C. A. 3), 119 F. (2d) 704, the court said:

"The appellee reminds us that we are not at liberty to disturb findings of fact made by the trial court unless they are unsupported by evidence or are otherwise clearly erroneous. Rule 52(a), 28 U. S. C. A. following section 723c. The reason for the rule rests in large part upon the fact that the trial judge who hears the witnesses testify and observes their demeanor upon the stand is better qualified to appraise the credibility of their testimony and to resolve the conflicts therein. So long, therefore, as a finding of fact is supported by evidence and is not clearly erroneous, it is to be accepted on appeal as verity.

"The rule does not operate, however, to entrench with like finality the inferences or conclusions drawn by the trial court from its fact findings. And so, while accepting the facts competently found by the trial court as correct, an appellate court remains free to draw the ultimate inferences and conclusions which, in its opinion, the findings reasonably induce. Such was the law prior to the promulgation of the Rules of Civil Procedure. *Brown v. United States*, 3 Cir., 95 F. (2d) 487, 490; *Dunn v. Trefry*, 1 Cir., 260 F. 147, 148. The new rules have worked no change in this regard, or with respect to the ultimate conclusions in jury-waived cases in particular. Cf. *Aetna Life Insurance Co. v. Kepler*, 8 Cir., 116 F. (2d) 1, 5. See also 3 Moore, Federal Practice, p. 3115, et seq., and notes of the Advisory Committee on Rule 52(a). The sufficiency of the evidence to sustain a trial court's conclusion or finding of an ultimate fact remains appropriate matter for an appellate court's consideration. *State Farm*

Mutual Automobile Insurance Co. v. Bonacci et al., 8 Cir., 111 F. (2d) 412, 415. Where the evidentiary facts are not in conflict or dispute, *the conclusions to be drawn therefrom are for the appellate court upon review of the trial court's action.* Cf. *United States v. South Georgia Railway Co.*, 5 Cir., 107 F. (2d) 3, and *United States v. Mitchell*, 8 Cir., 104 F. (2d) 343, 346. *An incorrect conclusion by a trial court qualifies as a 'clearly erroneous' finding, for the correction whereof on appeal Rule 52(a) specifically provides."*

It follows therefore that on both of these appeals this court is bound by the findings of fact entered by the trial court as to the facts themselves, but is not bound by the conclusions and inferences of the trial court, even though included among the findings of fact, and the same in so far as erroneous should be reversed. As to the correct inferences and conclusions to be drawn from the facts found by the trial court and shown by the overwhelming evidence herein, and hereinabove summarized, we submit that only one proper conclusion can be drawn, namely, that the equitable, beneficial owner of the 7500 shares, as well as the 5000 shares, was the Bank and not the Holding Company, and consequently that the entire gain as to the 11,000 shares sold was taxable solely to the Bank. The case therefore should be reversed upon plaintiff's appeal and affirmed upon defendant's appeal.

HOLDING COMPANY HELD THE STOCK IN TRUST OR AS AGENT FOR THE BANK

This is the principal, if not the only, question in this case as to both appeals. We do not believe there can be the slightest doubt as to the correctness of our conclusions. The Holding Company purchased the 7500 shares of Sunshine stock in August 1934 and held the same in trust or as the agent of the Bank pursuant to oral agreement then made. It was so testified by Messrs. Hardy, Rightmire, and Crawford. (Tr. 82-89, 93-97, 143, 156-159, 164-5, 170-1) They were the only surviving officials of these two corporations who handled these transactions, Messrs. Bradshaw and Miller having died prior to the trial.

Not a single witness has testified to the contrary. Defendant introduced no evidence whatsoever having any direct or material bearing upon the basic questions involved. The only witnesses called by defendant were William Bradshaw, the son of George H. Bradshaw, and A. J. Cooke. Bradshaw testified that at that time he was merely a bookkeeper for the Holding Company and made entries in the books thereof as instructed from time to time by his father, George H. Bradshaw. (Tr. 186, 192-5, 204-5) Defendant's only other witness was A. J. Cooke, a national bank examiner, who made examinations of this Bank from time to time. Mr. Hardy testified that he told Cooke about

these two stock transactions in December 1934 and in certain telephone conversations during the following few months. (Tr. 127-135, 145-6, 159-166, 179-181) This was denied by Cooke, who claimed that the first time he learned of this was during his examination of the Bank in June 1935.

Obviously it is wholly immaterial for tax purposes whether Cooke ever knew about this transaction. The trial court expressly stated in its opinion that it considered this conflict in the testimony of no moment whatever and that it would therefore purposely refrain from making any finding or conclusion thereon. (Tr. 462) In this the District Court was clearly right, as the dispute was of no moment or importance whatever.

On the other hand, Cooke's testimony directly corroborates and strengthens our position in that he testified directly in accord with plaintiff's witnesses that from time to time he as national bank examiner was urging Mr. Hardy and the Bank that the same be placed in better financial condition either through issuance of preferred stock to the R. F. C. or otherwise, to avoid an impairment of capital due to a number of doubtful assets acquired in the merger with First National Bank, of which Mr. Miller was a large stockholder. (Tr. 220-228, 233, 236-240, 242-252) This directly coincides with plaintiff's testimony upon the point, and shows the motive and purpose behind these entire transactions, namely, a desire to improve the financial con-

dition of the Bank. Under the undisputed evidence that was the sole purpose of both of these stock transactions, namely, to benefit the Bank by improving its financial condition and thereby to satisfy the national bank examiners without the necessity of issuing preferred stock to the R. F. C. (Tr. 97-101, 139, 144, 220, 246)

It is apparent therefore that defendant's evidence, so far as material at all, directly supports plaintiff's position in this case. Not a single witness has testified to the contrary.

The undisputed testimony of Messrs. Hardy, Rightmire and Crawford also conclusively establishes that the important letter of December 12, 1934, (Pl. Ex. 19, Tr. 47, 315) was prepared and signed by Mr. Bradshaw for the Holding Company and Mr. Crawford for the Bank on the date that it bears, December 12, 1934. (Tr. 82-89, 106, 107, 142, 157-8, 164-5, 244) Not a single witness has testified to the contrary. This was more than four months before the sale of the stock. The letter was signed before Mr. Miller went south to California for the winter, which occurred before Christmas 1934. (Tr. 157-8)

This letter, (Pl. Ex. 19, Tr. 315), has been hereinabove quoted in full and the same clearly and unequivocally establishes that all of this stock was purchased and held by the Holding Company "*for the account of the Bank.*" The same further provides:

"We therefore treated this stock as being held for the

bank, and if any loss results it is to be the loss of the bank, and of course if any profit results it will likewise accrue to the bank."

It is perfectly obvious that thereafter no court would have listened for a moment if the Holding Company had ever endeavored to make the contention that it and not the Bank was the beneficial owner of this stock or was entitled to the profit realized from the sale thereof. The Holding Company was conclusively bound by its solemn, written signed agreement, and the same is likewise of course binding upon the government for tax purposes.

In its "detailed opinion of the court on the facts" (Tr. 450, 463, 464), the court said:

"The testimony of Mr. Hardy, Mr. Rightmire and Mr. Crawford is that the foregoing letter and acceptance were written and signed on December 12, 1934, for the purpose of reducing to writing the understanding between the Holding Company and the Bank as to the two transactions. Each of the witnesses is a reputable citizen of Yakima. There was nothing in the demeanor of any of these witnesses on the stand nor was anything elicited by the cross examination to deprecate the value of the testimony. . .

"Mr. Hardy, Mr. Rightmire and Mr. Crawford were not impeached upon cross examination nor was there anything in their demeanor on the stand which would detract from the force of their testimony. . . .

"I give full weight to the testimony of Mr. Hardy and Mr. Rightmire and Mr. Crawford. Particularly, do I do this because I know Mr. Hardy and have great respect for his integrity."

Again in the "opinion of the court" (Tr. 466) the court said:

"The oral testimony of plaintiff was submitted by Mr. Hardy, Mr. Rightmire, the treasurer of the corporations, and Mr. Crawford, the cashier of the Bank. Four of the men who actively participated in the transactions herein involved died between 1934 and the time of trial. The three witnesses who did testify are highly reputable citizens of Yakima. The testimony was given in such a way as to merit consideration by the Court."

In paragraphs 6 and 12 of its formal findings of fact later entered, the District Court said in part:

"That on December 12, 1934, an agreement was entered into between the Holding Company and the Bank, executed in the form of an accepted letter, as follows: "
(then follows a copy of the letter—Pl. Ex. 19)

"That on December 12, 1934, the Holding Company by its secretary, George H. Bradshaw, wrote the letter to the Bank which is quoted above in paragraph 6. The foregoing agreement was executed and delivered on December 12, 1934, and was performed." (Tr. 484, 490)

It is undisputed that *none of the 7500 shares were ever held in the name of the Holding Company*. Of the 7500 share block, 5000 shares were taken and held *in the name of the Bank* and 2500 shares in the name of George H. Bradshaw, who was the secretary of the Holding Company and also a director and member of the executive committee of the Bank. [The evidence to this effect is undisputed. (Pl. Ex. 1, 5, Tr. 25, 256, 267) and the court so found. (Tr. 484)

It is also undisputed that this agreement, originally oral and later confirmed in writing and signed by both parties, was scrupulously carried out by all parties. In April 1935 when the 11,000 shares of stock were sold, all of

the stock certificates *were delivered by the Bank* to Drumheller, Erhlichman & White, stock brokers, who sold the stock and *paid the purchase price to the Bank*. The Bank then reimbursed the Holding Company for its disbursements for the purchase price of the stock and for the agreed "appreciation write-up" in the sum of \$1875, as the Holding Company's compensation in addition to the dividends previously received on the 7500 shares, and *the Bank retained all of the remaining profits realized on both transactions*. The brokers *delivered to the Bank* a certificate for the remaining 1500 shares and the same *was retained by the Bank* until sold in 1938. These facts are clearly established by the undisputed evidence (Tr. 64-69, 78-9, 107-8, 135, 141) and the court so found. (Tr. 489 to 492)

Naturally no entry was made with reference to either transaction on the Bank's books until the stock was sold and the profit realized, for two obvious reasons: (1) Under the national bank statutes it was admittedly improper for the Bank to own and hold the Sunshine stock. (2) The Bank at that time had not paid for the stock. Consequently there is nothing about that fact which in any way detracts from plaintiff's position. As hereinabove stated, the entry in the books of the Holding Company as to the 7500 share transaction had a designation written thereon, "YFNB", thereby designating the Bank's connection with the transaction. (Tr. 33, 35, 36, 118, 193-5, 202-5, 254, 284)

Consequently both the undisputed evidence and the

substantial evidence in the case conclusively establish and the trial court expressly found that the Holding Company and the Bank through their respective officers in 1934 made a trust agreement, originally oral and thereafter confirmed in writing and signed by both parties, that the 12,500 shares of Sunshine stock were to be held in trust for or as agent of the Bank and that the Bank would be entitled to the profit realized therefrom, and that this agreement was completely and literally carried out and performed by all parties. What more could anyone ask for as to conclusive proof of a trust relationship? *Manifestly a trust agreement, oral and written, entered into by both parties and performance thereof by both parties are conclusive as to the trust relationship.*

4.

EXPLANATION OF FACTS RELIED UPON BY DEFENDANT

What then are the facts relied upon by defendant as against this overwhelming mass of evidence?

1. Defendant and the trial court in its opinion rely strongly on the fact hereinabove stated that on January 6, 1935, entry was made in the Holding Company books as to the \$1875 "appreciation write-up", although the stock had not yet been sold, and also that the Holding Company received and retained the dividends on the 7500 shares.

The answer to this is obvious. That was the agreed

compensation which the Holding Company was to receive for its services in handling the transaction and for its advancement of the money for the purchase price. *The fact that the entry was made before the stock was sold is of no moment whatever as indicating the equitable ownership of the stock in the Holding Company.*

On the contrary, it clearly corroborates plaintiff's position. The Holding Company had a lien upon the stock for its advances and services. In order that its books should clearly show the amount of its lien or interest, the "appreciation" had to be entered on its books.

Of course the money had not been received by the Holding Company at that time, the entry could not be properly made if the Holding Company was the absolute owner of the stock for its own benefit, it would have been a fraudulent entry.

As stated in the District Court's opinion:

"The compensation the Holding Company was to receive for the use of this substantial part of its assets was to be the dividends which might be declared upon the mining stock while the Holding Company was holding it, plus a small write-up which might be allowed to the Holding Company if the joint officers deemed it advisable. It was agreed that any profits which might accrue upon the stock would be the profits of the Bank and that any losses upon the stock would be the losses of the Bank." (Tr. 476)

The original agreement was very definite and explicit that this "appreciation write-up" was to be determined

“at the end of the year” 1934. The letter of December 12, 1934, (Pl. Ex. 19, Tr. 315) definitely provides:

“The Yakima Holding Corporation was to be reimbursed for the amount actually paid for the stock, plus a small appreciation *to be determined at the end of the year* if this should be deemed necessary.”

This entry in the books was made early in 1935, shortly after the end of the year 1934, and *was directly in accord with the agreement* between the Holding Company and the Bank, and at that time became a liquidated amount due and had to be entered on the books. The very fact that this entry was made in the books admittedly on January 6, 1935, is additional evidence which strongly overwhelms the ridiculous contention of the defendant, wholly unsupported by anything whatever in the evidence, that this whole matter was purely an after-thought devised in April 1935 when the stock was sold. The books of the Holding Company themselves show that as early as January 6, 1935, the parties were actually engaged in carrying out the definite terms of their agreement.

2. The fact that no mention hereof appears in the minutes of either corporation as to any meeting of the board of directors, executive committee or stockholders until April 12, 1935.

This, however, is merely a lack of certain additional corroborating evidence, but is not a weakness of any substantial moment in plaintiff's case, and certainly does not establish defendant's contention. The evidence is clear,

definite and undisputed that frequent meetings of the executive committee of the Holding Company and the Bank were held and that as a rule no minutes were kept of such meetings. (Tr. 134) Also that this matter was discussed and authorized at such meetings in 1934. The officers of the Bank were present and had personal knowledge that the Holding Company had duly authorized and approved this transaction, and they had no fear that the Holding Company would violate this solemn agreement. Especially so when the Holding Company did not have possession of the stock and 5000 shares of the first 7500 block was in the name of the Bank. Eventually these transactions were definitely approved in the official records of the meeting of the Holding Company executive committee on April 12, 1935, which was two or three weeks prior to the sale of the stock. (Pl. Ex. 15, Tr. 308)

Under the by-laws the action of the executive committee was binding upon the corporation where rights of third parties were affected. (Pl. Ex. 15, Tr. 297)

Some reliance is also placed on an expression used in the minutes of April 12, 1935, (Pl. Ex. 15, Tr. 309) "also the 7500 shares of Sunshine stock already owned by the Yakima Holding Corporation." However a reference to the context shows that the minutes had just been referring to the Miller stock which *had not* yet been paid for by the Holding Company nor transferred from Miller. This was merely an expression used to differentiate the 7500 shares

which *had* already been fully paid for by the Holding Company and transferred from the original owner into the name of the Bank and Bradshaw. The Holding Company had ownership in the sense that it had legal title. That the same was subject to a trust in favor of the Bank, and that the Bank was the holder of equitable title and entitled to the full benefit of the profits to be realized, is shown by the context and by the reading of the minutes as a whole, as well as the letter of December 12, 1934, therein specifically referred to and approved. We submit that it is absurd to pick out one isolated clause written by a layman when the document read as a whole leaves no doubt whatever that the entire beneficial interest in both transactions was in the Bank and not the Holding Company.

3. Reliance is also placed upon the fact that the financial statement of the Holding Company under date of January 7, 1935, which was read at the annual stockholders' meeting on February 5, 1935, contained the item: "other stock investments, \$61,451.50," and the minutes show no specific reference to this transaction.

This entry, however, was perfectly proper. The Holding Company had made an investment which, including the \$1875 "appreciation write-up" amounted to that exact figure, \$61,451.50. It was an investment in stock which had actually been made by the Holding Company out of its own funds, although borrowed from the Bank. The Holding Company's interest, investment, claim or lien on or in the

stock amounted to \$61,451.50, and no more. And that is an investment. It was in fact at that time a substantial asset of the Holding Company by reason thereof, and this does not in any way negative the beneficial ownership thereof by the Bank as cestui que trust, in fact confirms it.

If A makes an arrangement with B, a broker for example, that B shall purchase and pay for ten shares of American Telephone stock, and that B shall advance the money for the purchase price thereof, and shall hold the stock as security and in trust for A, and that A shall bear the loss if the stock goes down and be entitled to the profit if the stock goes up, manifestly the broker B has a substantial interest and investment in the stock until his advances are repaid. But this does not in any way negative the fact that A has a beneficial interest as cestui que trust and is entitled to the profit if the stock goes up, upon reimbursement of B for the purchase price and compensation for his services.

1 Scott on Trusts, sec. 12.10, p. 104; 2 Restatement Trusts sec. 448.

The management of the corporation was vested in the board of directors and the executive committee. Approval of these transactions by the stockholders was wholly unnecessary. Explanation of these transactions to the stockholders would have inevitably resulted in such publicity that the same would have become a matter of public information, and in those troublous depression days of Feb-

ruary 1935 would have probably resulted in a run on the Bank. Under the by-laws submission of such matters to the stockholders for ratification was discretionary with the board of trustees, (Pl. Ex. 15, Tr. 295) and certainly under these circumstances the board did not abuse its discretion in electing not to do so.

Of course, as hereinabove stated, no entries were made in the Bank's books prior to the sale of the stock (1) in view of the limited powers of national banks under the statute, and (2) because the Bank at that time had not paid for the stock.

We might mention in passing that *Geddes v. Anaconda Mining Co.*, 254 U. S. 590, was referred to in the court below as requiring fairness in transactions between corporations having interlocking directorates. This principle, however, is not germane to any of the issues involved on these appeals. There is not the slightest suggestion in the evidence of any unfairness to any party involved. Obviously the stockholders of the Holding Company were vitally interested as much as anyone in putting the Bank in good standing with the national bank examiners, as they through the Holding Company owned all of the stock of the Bank except qualifying shares. These transactions were for the best interests of the stockholders of the Holding Company in benefiting the Bank, of which indirectly they were the owners. No stockholder or creditor of the Holding Company is or ever has complained.

This concern for the stockholders of the Holding Company is somewhat ironical when the party expressing the concern is attempting to mulct them out of thousands of dollars. It is their money plaintiff is attempting to recover for their benefit.

The Holding Company was bound by its agreement, as all of the parties well knew. The interest of the Bank was shown by the designation "YFNB" appearing opposite these entries in the books of the Holding Company, which was an admission binding upon the latter. Even if, however, it be considered that the Holding Company's books did not fully show the interest of the Bank, the books would be deemed self-serving declarations of the Holding Company, and of course not binding on the Bank.

22 C. J. 220, sec. 193, and cases cited.

4. Finally it is suggested that the Holding Company had no legal power to act as trustee.

True, its articles of incorporation do not expressly use that term. They do, however, contain extremely broad grants of power which we submit were sufficient to permit it to engage in these two isolated transactions directly for the benefit of the Bank of which it owned all of the stock:

"The objects and purposes of the formation of this corporation are to establish a holding company to take and hold the capital stock of banks, trust companies, corporations, joint stock companies and associations, and generally to hold corporate stocks, bonds and obligations . . . To buy, own, hold, purchase, receive or acquire, and to sell, negotiate, guarantee, assign, deal

in, exchange, transfer, mortgage, pledge or otherwise dispose of *shares of capital stock, issued by banks, trust companies or other corporations, . . . and to do any acts or things designed to protect, preserve, improve or enhance the value of any such shares, . . .* To organize, incorporate, re-organize, finance and to aid and assist financially or otherwise, companies, corporations, joint stock companies, syndicates, partnerships and associations of all kinds, *particularly those engaged in banking, or in other financial enterprises, and to underwrite, subscribe for and endorse the bonds, stocks, securities, debentures, notes or undertakings of any such companies, corporations, joint stock companies, syndicates or associations, or to make any guarantees in connection therewith or otherwise for the payment of money or for the performance of any obligation or undertaking, and to do any and all things necessary or convenient to carry any of such purposes into effect.*

. . . "To undertake and carry on any business, undertaking, enterprise, venture, transaction or operation generally undertaken or carried on by promoters, contractors and merchants, and in the course thereof, to acquire and dispose of or otherwise to turn to account or realize upon all or any negotiable or transferrable instruments or securities. . . . *To loan money and to take as evidence of any security for money loaned, notes, mortgages, deeds of trust, bonds, debentures or other choses in action. . . . To do any and all acts and things necessary and convenient to the attainment of the purposes for which this corporation is organized, or any of them, and to the same extent as natural persons lawfully could do in any part of the world in so far as such acts are permitted to be done by a corporation organized under the laws of the State of Washington.*" (Pl. Ex. 15, Tr. 289-294)

Under the circumstances shown here these isolated transactions were reasonably incidental to the business of the Holding Company as a holding company and hence were not ultra vires.

1 Scott on Trusts, sec. 96.3, p. 509;;

Latshaw vs. Western Townsite Co., 91 Wash. 575, 158 P. 248;

Mercy v. Hall & Son, Inc., 177 Wash. 338, 31 P. 2d 1009;

First University Investment Corp. v. Roosevelt Savings & Loan Assn., 170 Wash. 444, 16 P. 2d 820;

Castle & Co. v. Public Service Underwriters, 198 Wash. 576, 89 P. 2d 506.

Of course the law of the State of Washington governs, both because this transaction occurred there and this was a Washington corporation.

Erie Ry. Co. v. Tompkins, 304 U. S. 64, 82 L. Ed. 1188, 114 A. L. R. 1487.

Moreover under the law of Washington, as well as that generally recognized, the Holding Company would have been clearly estopped to assert any claim of ultra vires in view of the partial performance and the benefits received from the transactions:

Creditors Claim & Adjustment Co. v. Northwest Loan & Trust Co., 81 Wash. 247, 142 Pac. 670, L.R.A. 1917 A 737, Ann. Cas. 1916D 551;

Flannagin v. American Minerals Producing Co., 108 Wash. 569, 185 Pac. 609;

First University Investment Corp. v. Roosevelt Savings & Loan Assn., 170 Wash. 444, 16 P. 2d 820;

Castle & Co. v. Public Service Underwriters, 198 Wash. 576, 89 P. 2d 506;

Union Fruit Producers v. Plumb, 1 Wn. (2d) 378, 95 P. 2d 1033;

Frost v. Puget Sound Realty Assn., 57 Wash. 629, 107 Pac. 1029;

Tootle v. First National Bank, 6 Wash. 181, 33 Pac. 345;

Korn v. Spokane Trust Co., (C.C.A. 9) 276 Fed. 68;

Equitable Trust Co. v. Washington-Idaho Light & Power Co., 300 Fed. 601, 614.

The defendant in this case cannot raise the issue of ultra vires; it has no standing in court for such a purpose.

13 Am. Jur., sec. 759, p. 790.

Besides, the law is well established:

“Even though a corporation is not expressly authorized by its charter or certificate of incorporation to engage in the business of administering trusts, it is within its corporate power to administer trusts for such purposes as are germane to the purposes for which it is created.”

1 Scott, Trusts, sec. 96.3, p. 509;

Latshaw v. Western Townsite Co., 91 Wash. 575, 158 P. 248.

We therefore conclude that the facts relied upon by the defendant are trivial and unimportant, and that the overwhelming weight of the evidence in this case conclusively shows that both of these blocks of stock were purchased and held by the Holding Company in trust for the Bank.

5.

AUTHORITIES ESTABLISH TRUST RELATIONSHIP

The legal principles applicable to this trust relationship

between these parties are elementary, well settled, and have been repeatedly recognized by this court.

The authorities clearly establish that a trust relationship existed here.

Adamson v. Black Rock Power & Irrigation Co., (C.C.A. 9) 297 Fed. 905;

Portland Cremation Assn. v. Commissioner, (C. C. A. 9) 31 F. 2d 843;

26 R. C. L. 1182 therein cited;

Chicago, etc., Ry. Co. v. Des Moines, etc. Ry Co., 254 U. S. 196, 65 L. Ed. 219, 41 S. Ct. 81, therein cited;

O'Meara v. Commissioner, (C.C.A. 10) 34 F. 2d 390;

Foreman v. Foreman, 251 N. Y. 237, 167 N. E. 428;

Tucker v. Brown, 199 Wash. 320, 92 P. 2d 221;

Holmes v. Holmes, 65 Wash. 572, 118 Pac. 733.

For convenience of the court quotations from these authorities will be found in the appendix herein.

[That the arrangement between Bank and Holding Company created a fiduciary relation with all the characteristics, rights and obligations of a trust and vested in the Bank all of the beneficial interest in the Sunshine stock, is too clear for argument.

1 Restatement, Trusts, sec. 8, comment f, and sec. 24;

1 Scott on Trusts, sec. 8, p. 65.

When property is brought by A for "the account" of B, that being the language of the letter of December 12, 1934, (Pl. Ex. 19, Tr. 315) all of the beneficial interest belongs

to B. The legal title may be in either, or a third party, and possession may be in either or a third party. When the legal title or possession is in A or a third party, A has a security interest in the property for his advances, if any, and his services. When something is done "for" your account or similar words, it clearly shows that the person was acting in a representative capacity, the word "for" meaning "on behalf of."

Donovan v. Welch, 90 N. W. 262, 264.

An endorsement of a check "for the account of" B creates a trust in favor of B and the holder of the check is a trustee.

Freeburg v. Stoddart, 28 Atl. 1111;

White v. Miners National Bank, 102 U. S. 658, 661, 26 L. Ed. 250;

First National Bank of Belmont v. First National Bank of Ramesville, (Ohio) 50 N. E. 723, 724.

Stock bought by A for the account of B belongs to B. A however has a security interest and if A has possession or title, he has it as pledgee or trustee for B.

12 C.J.S. 74, sec. 29;

9 C. J. 542-3, sec. 45.

Under the undisputed evidence in this case hereinabove referred to and under the foregoing well settled principles, there cannot be any doubt whatever that this stock was held in trust by the Holding Company for the Bank.

PRESUMPTION OF COMMISSIONER'S CORRECTNESS
WAS FULLY OVERCOME BY THE EVIDENCE

Defendant, having no substantial evidence upon which to rely, is forced to rely upon the presumption as to the correctness of the Commissioner's deficiency assessment, and contends that that should be thrown into the scales to be considered as substantial evidence. We believe that to some extent the District Court was probably misled by this contention. (Tr. 469, 470)

That defendant's contention has no merit is well settled. It is elementary that in the absence of evidence the presumption favors the defendant which relies upon a ruling of the Commissioner in such cases; but it is equally well settled that when the plaintiff introduces substantial evidence to overcome the presumption of correctness of the Commissioner's ruling, the presumption then entirely disappears from the case and is not to be weighed in the scales as evidence.

(This court removed all doubt upon the question in *Ariasi v. Orient Insurance Co.*, 50 F. 2d 548, involving the presumption that officers acted rightly in the performance of their legal duties in revoking a winery permit, and hence that wine thereafter in the possession of the permittee was illegally possessed, the question arising in a suit to recover under a fire insurance policy for its loss. This court said:

“The question for our consideration then is, did the testimony of the appellant directly controverting this *prima facie* evidence of illegal possession require the trial court as a matter of law to find the fact to be as he testified them to be? Although there is a fundamental rule of law that a trial court is not required to accept the testimony of any witness as true, but must weigh the testimony of such witness in connection with all the other evidence in the case and determine the truth, *in the absence of all contradictory evidence and any inherent improbability in the testimony, the court cannot arbitrarily reject the testimony of a witness whose testimony appears credible.* . . .

“The difficulty with this claim is that although this conclusion was required in the absence of any evidence to the contrary, *the prima facie effect of the revocation is dissipated by positive evidence to the contrary. It does not constitute evidence to be placed in the scale and weighed as against the positive evidence of the plaintiff to the effect that he did not intend to violate the law and had not done so.*”

In *New York Life Ins. Co. v. Gamer*, 303 U. S. 161, 82 L. Ed. 726, 58 Sup. Ct. 500, 114 A.L.R. 1218, the court said:

“*The presumption is not evidence and ceases upon the introduction of substantial proof to the contrary.* . . .

“The evidence being sufficient to sustain a finding that the death was not due to accident, there was no foundation of fact for the application of the presumption; and the case stood for decision by the jury upon the evidence unaffected by the rule that from the fact of violent death, there being nothing to show the contrary, accidental death will be presumed. *The presumption is not evidence and may not be given weight as evidence.*”

See also the numerous federal cases to the same effect therein cited. The court further said that with the

presumption eliminated the question should be determined
"by the greater weight of evidence."

In *Del Vecchio v. Bowers*, 296 U. S. 280, 80 L. Ed. 229, 56 Sup. Ct. 190, the court said:

"Once the employer has carried his burden by offering testimony sufficient to justify a finding of suicide, the presumption falls out of the case. It never had and cannot acquire the attribute of evidence in the claimant's favor. Its only office is to control the result where there is an entire lack of competent evidence. If the employer alone adduces evidence which tends to support the theory of suicide, the case must be decided upon that evidence. Where the claimant offers substantial evidence in opposition, as was the case here, the issue must be resolved upon the whole body of proof pro and con."

In *Cooperative Publishing Co. v. Commissioner*, 115 F. 2d 1017, a tax case, this court reversed a decision of the Board of Tax Appeals and directed entry of a new order
"without relying upon the presumption in favor of the Commissioner's finding that such assets had no cost, as that presumption was fully overcome by the evidence."

In *Seaside Improvement Co. v. Commissioner*, (C.C.A. 2) 105 F. 2d 990, a tax case, cited by this court in the Cooperative Publishing case, the court said:

"Once the taxpayer had introduced evidence as to the basic value, the presumption was out of the case."

In *Paul v. United Ry. Co.*, 152 Mo. App. 577, 134 S. W. 3, quoted with approval in *Beeman v. Puget Sound T. L. & P. Co.*, 79 Wash. 137, 139 Pac. 1087, the court said:

“‘Presumptions’ as happily stated by a scholarly counselor ore tenus, in another case, ‘*may be looked on as bats of the law, flitting in the twilight but disappearing in the sunshine of actual facts.*’ That presumptions have no place in the presence of actual facts disclosed to the jury, or where plaintiff should have known the facts had he exercised ordinary care, is held in many cases of which samples are, *Reno v. Railroad*, 180 Mo. 1. c. 483; *Nixon v. Railroad*, 141 Mo. 1. c. 439; *Bragg v. Railroad*, 192 Mo. 331. To give place to presumptions on the facts of this case is but to play with shadows and reject substance.”

In *Sullivan v. Associated Dealers*, 4 Wn. (2d) 352, 103 P. (2d) 489, the court said:

“We have held so many times that it would seem to need no citation of authority that this *presumption is not evidence, and relates only to a rule of law as to which party shall first go forward and produce evidence* to sustain the matter in issue; that it will serve in the place of evidence only until *prima facie* evidence has been adduced by the opposite party; and that *the presumption should never be placed in the scale of evidence.*”

See also to the same effect:

Bradley v. Savage, Inc., 13 Wn. (2d) 28, 123 P. (2d) 780;

Anning v. Rothschild & Co., 130 Wash. 232, 226 Pac. 213;

Scarpelli v. Washington Water Power Co., 63 Wash.18, 114 Pac. 870;

Peters v. Lohr, (S.D.) 124 N. W. 853;

Caswell v. Maplewood Garage, 84 N. H. 241, 149 Atl. 746, 73 A.L.R. 433;

Fiocco v. Carver, 234 N. Y. 219, 137 N. E. 309 (by Judge Cardozo);

Phillip v. Schlager, 214 Wis. 370, 253 N. W. 394;

Watkins v. Prudential Insurance Co., 315 Penn. 497,
173 Atl. 644, 95 A. L. R. 869, and numerous cases
cited in the annotation thereto at page 878;

Weiget v. Becker, (C.C.A. 8) 84 F. 2d 706;

Albrecht & Son v. Landy, Collector, 114 F. 2d 202;

Massachusetts Bonding & Ins. Co. v. Hudspeth, 94 F.
2d 467;

Equitable Life Assur. Soc. v. McDonald, (C.C.A. 9) 96
F. 2d 437, certiorari denied, 305 U. S. 624;

Flannery v. Wilcuts, 25 F. 2d 951.

*"Inferences or presumptions speak in the absence of
evidence, but cannot be weighed in the balance as
against evidence."*

Guaranty Trust Co. v. Minneapolis & St. Louis R. Co.,
(C.C.A. 8) 36 F. 2d 747, certiorari denied, 281 U. S.
756.

In *Department of Water and Power v. Anderson*, (C.
C. A. 9) 95 F. 2d 577, 583, certiorari denied, 305 U. S. 607,
this court said:

*"If the opposing party complies with the presumption
or procedural rule of law, and introduces evidence, the
presumption thereafter has no application or function,
and disappears entirely."*

7.

CLEAR AND CONVINCING EVIDENCE UNNECESSARY

The District Court erroneously held (Tr. 470) as con-
tended by defendant that clear and convincing evidence is

necessary to overcome such presumption. That this is not the law is clearly established by the numerous authorities cited above. When evidence is introduced, the presumption is taken out of the case and the question is to be determined as in all cases by the preponderance of the evidence. In this case we did introduce clear and convincing evidence, in fact conclusive evidence, to show the error of the Commissioner. The District Court erred, however, in holding that clear and convincing evidence was necessary. The cases cited were misinterpreted and actually make no such holding.

Of the four cases cited in the court's opinion ((Tr. 470) *Pearce v. Commissioner*, 315 U. S. 543, 86 L. Ed. 1016, and *Helvering v. Fitch*, 309 U. S. 149, 84 L. Ed. 665, involved a special rule applicable to a special situation, namely, whether ex-husband or ex-wife was liable for income tax based on alimony payments after the divorce. The presumption in such cases is so strong that the husband is liable for the tax in such cases because of his continuing obligation to support the ex-wife, that the special rule has arisen that the husband has the burden of showing by clear and convincing evidence that the Commissioner is wrong if he so holds. On the other hand, the wife (the *Pearce* case involves only the wife) sustains her burden "merely by showing doubt and uncertainty as to whether the payments were made pursuant to her former husband's continuing obligation to support her." In the *Pearce* case the husband purchased and paid for an annuity insurance policy payable

to the wife and the Supreme Court held that the ex-wife, who was the beneficiary thereof, and not the ex-husband, was liable for the tax on income received therefrom, as she was in effect the beneficial holder thereof. It will thus be seen that actually the Pearce case directly supports our position in this case rather than the contrary.

There is not the slightest suggestion in either of these cases that clear and convincing evidence is necessary as a general rule in order to overcome the presumption of the correctness of the Commissioner's ruling.

The other two cases cited, *Welch v. Helvering*, 290 U. S. 111, 78 L. Ed. 212, and *Wickwire v. Reinecke*, 275 U. S. 101, 72 L. Ed. 184, merely refer to said presumption of correctness and that the burden of proof is upon the taxpayer, but *do not hold* that clear and convincing evidence is necessary. It is recognized in these cases and the cases cited therein, as well as those cited under the preceding subdivision of this brief, and in fact every case on the subject of which we are aware, except a few cases involving the special husband and wife relationship, that clear and convincing evidence is not necessary and that the general rule as to the controlling effect of the preponderance or greater weight of the evidence controls.

8.

ILLEGALITY NO DEFENSE

The answer of the defendant contains no affirmative

defense, such as illegality or ultra vires. It is elementary that such defense to be available must be affirmatively pleaded in the answer. Federal rule 8c so requires.

It is of course well settled—and this was no doubt the reason for not pleading the same—that the illegal nature of a transaction is wholly immaterial upon a question of income tax liability.

Angelus Building & Investment Co. v. Commissioner, (C.C.A. 9) 57 F. 2d 130, certiorari denied, 286 U. S. 562;

Penn v. Robertson, (C.C.A. 4) 115 F. 2d 167, 172-175, and the decision of the District Court in the same case therein affirmed, 29 F. Sup. 386;

Becker v. Scofield, (C.C.A. 9) 221 F. 322, affirmed 243 U. S. 114, 61 L. Ed. 626;

Huston v. Drake, (C.C.A. 9) 97 F. 2d 863, 867;

Hamburg Bank v. Onacheita National Bank, (C.C.A. 8) 78 F. 2d 100, 105.

U. S. v. Sullivan, 274 U. S. 259, 71 L. Ed. 1037, 54 A.L.R. 1020;

Steinberg v. U. S., (C.C.A. 2) 14 F. 2d 564.

In the *Angelus* case, *supra*, this court said:

“The government in the collection of its revenues takes no notice of any situation of accountability to a state that the taxpayer may have caused to exist through his own wrongdoing. His transactions are as he has made them, and, if real income credits have been created which are subject to be taxed, they are to be assessed accordingly.”

There was, however, nothing illegal about this transaction. The same was merely ultra vires and in excess of

the powers of the Bank. The distinction between ultra vires and illegality is fundamental and well settled. In *Williston on Contracts* (Rev. Ed.) Vol. 1, page 787, sec. 271, the learned author says:

“Practically all revisions of corporate statutes have adopted the agency theory (as to ultra vires), but *the distinction between ultra vires and illegality remains.*”

Again in Vol. 6, page 5027, sec. 1770 of the same work Williston says:

“Reference may also be made here to ultra vires contracts of corporations. *Lack of corporate capacity should not be confused with illegality.*”

The only pertinent provisions of the national bank statutes, as amended June 16, 1933, 12 U.S.C.A. 24 (7) are as follows:

“. . . The business of dealing in investment securities by the association shall be limited to purchasing and selling such securities without recourse, solely upon the order, and for the account of, customers, and in no case for its own account, and the association shall not underwrite any issue of securities. . . .

“Except as hereinafter provided or otherwise provided by law, nothing herein contained shall authorize the purchase by the association of any shares of stock of any corporation.” . . .

It will be noted that it is recognized in the act that a national bank does not have lawful power to purchase stock in corporations, but there is no positive prohibition thereof, the same is not declared to be illegal, and no penalty is imposed therefor. Clearly therefore these transac-

tions, although ultra vires as to the Bank and therefore voidable by it, were not illegal and were not void. The District Court in its opinion (Tr. 471) correctly said:

“There is no serious difference between the parties in the opinion that since this law contains no positive prohibition against the purchase of corporate stocks by a National bank that a bank’s contract to purchase stock is not illegal and void, but is ultra vires and voidable. *Lantry v. Wallace*, 182 U. S. 536; *First Nat. Bank v. Stewart*, 107 U. S. 676. That being true, plaintiff’s contention that in this case ‘The Bank could not lose. If the price went up it could enforce the deal against the Holding Company. If it went down it could refuse to perform,’ must be accepted as a correct statement of the legal consequences of the situation.”

Compare the foregoing section with 12 U. S. C. A. 83, being the act of 1864 which provided:

“No association shall make any loan or discount on the security of the shares of its own capital stock, nor be the purchaser or holder of any such shares”, etc.

Obviously if under the 1864 statute a purchase of the Bank’s own shares is merely ultra vires and not illegal or void, a fortiori the same must be true that a purchase by a bank of stock in another corporation cannot be more than merely ultra vires.

In *Lantry v. Wallace*, 182 U. S. 536, 45 L. Ed. 1218, the court said:

“In view of these decisions it cannot be held that the purchase by the bank of its own shares of stock was void. It was of course a matter of which the government by its officers could take cognizance; and it may be that it was a matter of which stockholders, having

an interest in the proper administration of the affairs of the bank, could complain in a proceeding instituted by them to restrain the bank from violating the statute. But when the violation of the statute has occurred, it is not a matter of which a shareholder can complain in order that he may be relieved from the liability attaching to him as a shareholder and which the receiver seeks to enforce under the orders of the Comptroller. In the present case Judge Thayer, delivering the opinion of the circuit court of appeals, well said: "In considering the second defense which was interposed by the defendant, it is important to bear in mind that the 200 shares of stock which he purchased from the bank was not void stock, but was stock which, according to the averments of the answer, had once been issued to other persons, and had been reacquired by the bank by purchasing it from such other persons, to prevent them from throwing it on the market at ruinous prices. It is necessary to infer from the averments of the answer that this stock had once passed the scrutiny of the Comptroller and had been outstanding and had been held by other persons since the organization of the bank in the year 1891. *The purchase of this stock by the bank under the circumstances disclosed by the answer was doubtless ultra vires, but the purchase in question did not render the stock void.* In purchasing it the bank made an unlawful use of its funds for which the officers concerned in the transaction could have been held responsible, as for any other unlawful act, if the corporation had sustained damage; but in point of fact, by the sale of the stock to the defendant, that portion of its capital which had been dissipated by the purchase was restored by the resale, and no loss seems to have been incurred. We are at a loss to understand how this transaction on the part of the bank can operate to relieve the defendant from his liability as a stockholder in a suit brought by the receiver to recover a stock assessment which was levied solely for the benefit of corporate creditors. The sale of the stock to the defendant after the bank had purchased the same was not unlawful, since it operated to restore that part of the capital that had been retired,

and to that extent repaired the wrong which might otherwise have been done to the bank's creditors.' 38 C. C. A. 510, 514, 97 Fed. 865, 868."

In *First National Bank v. Stewart*, 107 U. S. 676, 27 L. Ed. 592, the court said:

"While this section, in terms, prohibits a banking association from making a loan upon the security of shares of its own stock, it imposes no penalty, either upon the bank or borrower if a loan upon such security be made. If, therefore, the prohibition can be urged against the validity of the transaction by anyone except the government, it can only be done before the contract is executed, while the security is still subsisting in the hands of the bank. It can then, if at all, be invoked to restrain or defeat the enforcement of the security. When the contract has been executed, the security sold, and the proceeds applied to the payment of the debt, the courts will not interfere with the matter. Both bank and borrower are in such case equally the subjects of legal censure, and they will be left by the courts where they have placed themselves."

The foregoing cases were cited with approval in *Oppenheimer v. Harriman National Bank*, 301 U. S. 206, 81 L. Ed. 1042.

In *The Seattle*, (C. C. A. 9), 170 Fed. 284, 287, this court said:

"The law has imposed no penalty upon a national bank for its failure to obey the restriction, unless it be that its charter thereby becomes subject to forfeiture under section 5239. A court may not inflict penalties other than those which are imposed by statute. The bridge company could have made no defense in the present case on the ground that the bank had violated the statute. *Gold Mining Co. v. National Bank*, 96 U. S. 640, 24 L. Ed. 648."

If a loss had occurred, Mr. Miller, who was the moving spirit, and the bank officers, Messrs. Hardy, Rightmire and Crawford, were personally liable to the bank.

McKinnon v. Mosse, 177 Fed. 576;

Cooper v. Hill, 94 Fed. 582;

Atherton v. Anderson, 86 F. 2d 518; 526-7 (remanded on another point, 302 U. S. 643);

12 U. S. C. A. 93.

In *Jackman v. Continental National Bank*, (C. C. A. 8) 16 F. 2d 728, 51 A. L. R. 336, 344, after a review of the authorities, the court said:

“The gist of these decisions, therefore, is that debtors, borrowers, and private parties generally, cannot complain of such unwarranted exercise of power by national banks, particularly after the power has been exercised to the extent of a sale of the securities and an application of the proceeds, and that, as against the bank itself, the government alone can interfere, by proceedings in ouster and dissolution.”

See also to the same effect:

9 C. J. S. 1220, 1243, sec. 664, 665, 688, and cases cited;

National Bank v. Matthews, 98 U. S. 621, 25 L. Ed. 188;

12 U. S. C. A. 93;

First National Bank v. Shewalter, (Mo.) 134 S. W. 12;

First National Bank v. Smith, 65 N. W. 437.

Clearly therefore the Holding Company could not have refused to carry out its agreement because the transaction was ultra vires as to the Bank. The transaction was valid, lawful and binding except voidable by the Bank

if there was a loss. Otherwise the question could only be raised by the government in a quo warranto proceeding. Both transactions having shown a large profit, no one was injured and no one was in a condition to complain because the same were ultra vires as to the Bank. Obviously this would not affect the income tax liability of either the Bank or the Holding Company.

9.

PROFIT ON SALE OF STOCK WAS TAXABLE TO BANK AS BENEFICIAL OWNER

As we understand, defendant does not dispute the legal proposition that if the Holding Company purchased and held this stock as trustee or agent for the Bank, the gain derived from the sale thereof is of course properly taxable to the Bank as beneficial owner and not to the Holding Company. This principle is of course well settled.

112 West 59th Street Corporation v. Helvering, (C. A. D. C.) 68 F. 2d 397, is directly in point. The court said:

"In *Central Life Society v. Commissioner*, 51 F. 2d 939, 941, the Court of Appeals in the Eighth Circuit, speaking through Judge Stone, said: 'Tax laws are essentially practical in their purposes and application, and the federal income tax laws are no exception. While for purposes of convenience and certainty in collection of such taxes, it is sometimes provided that those who collect income for others shall pay therefrom the taxes thereon, yet a cardinal purpose of the income tax laws is to tax the income to the person who has the right or beneficial interest therein, and not to throw

the burden upon a mere collector or conduit through whom or which the income passes.'

"We think this a correct statement of the law. If, therefore, it appears, as we think it does appear, that petitioner was a mere 'conduit' and that it never at any time had any legal right to retain the profits from the transaction in question and never at any time had possession of such profits, but that on the contrary the profits in right and in law were always the property of the trust, then it would seem to follow that the liability to pay the tax under the federal income tax laws was solely a liability of the trust and not a liability of petitioner. And this is particularly true when we consider that the former duly reported and paid the tax and no question of bad faith in the organization of petitioner or in its participation in the transaction is or can be attributed to it. The brief of the Commissioner frankly says 'there is no fraud here.'

"That petitioner on the admitted facts is a mere trustee is beyond question. If the contest instead of involving a tax, were a contest between petitioner and the trust, it would be unconscionable to argue that, because the property was taken in petitioner's name, it could claim a beneficial ownership therein. It may well be that at the time of the transaction there was no specific or formal agreement that petitioner should hold the property for the benefit of the trust, but *the absence of such agreement or the lack of formality does not alter the obvious intent of the arrangement.* No court would in the circumstances we have named permit it to retain the property or the profits in fraud of the real owner. Petitioner is a New York corporation, and the doctrine we have stated is that recognized and enforced by the courts of that state. . . .

"The corporation thus created furnished the structure for the taking and the holding of the legal title and the channel through which to pass it when the sale was made, but it furnished nothing more. It had no other function and performed none. It held the legal title, but it recognized at all times that the equit-

able title was in the trust. In such circumstances the Tax Board has many times held that *no income accrues to the person in whose name the property is so held*. Stewart Forshay, 20 B.T.A. 537; Greenleaf Textile Corp., 26 B.T.A. 737; Moro Realty Corp., 25 B.T.A. 1135. In the latter case, the Board's decision was affirmed without opinion by the Court of Appeals in the Second Circuit (65 F. 2d 1013). . . .

"It cannot be that the mere absence of an express agreement to hold the property as trustee can be said to be conclusive of the negative of that relationship. The question is rather one of fact, and, as we have seen, the facts proved and found by the Board irrefragably show the true nature of the transaction to have been a naked trusteeship."

See also to the same effect:

Central Life Assurance Society v. Commissioner, (C. C. A. 8) 51 F. 2d 939;

Bettendorf v. Commissioner, (C. C. A. 8) 49 F. 2d 173;

Shellebarger v. Commissioner, (C. C. A. 7) 38 F. 2d 566;

Riker v. Commissioner, (C. C. A. 2) 42 F. 2d 150;

DeBrabrant v. Commissioner, (C. C. A. 2) 90 F. 2d 433;

U. S. v. Arnold, (C. C. A. 3) 89 F. 2d 246;

Johnson v. Commissioner, (C. C. A. 8) 88 F. 2d 952, 955, 956;

Letts v. Commissioner, (C. C. A. 9) 84 F. 2d 760;

Irwin v. Gavitt, 258 U. S. 161, 69 L. Ed. 897;

Byrne v. Commissioner, (C. C. A. 3) 110 F. 2d 294;

Sewell v. U. S. (Ct. of Claims) 19 Fed. Supp. 657;

Title Guarantee Loan & Trust Co. v. Commissioner,
(C. C. A. 5) 63 F. 2d 621;

Mattern v. Commissioner, (C. C. A. 9) 61 F. 2d 663, 665;

Edmonds v. Commissioner, (C. C. A. 9) 90 F. 2d 14,
cert. den. 302 U. S. 713;

Meeker v. Durey, (C. C. A. 2) 92 F. 2d 607;

Connery Coal & Investment Co. v. Commissioner, (C.
C. A. 7) 84 F. 2d 485, 487;

White v. Ross, (C. C. A. 5) 73 F. 2d 236, 237;

Helvering v. Butterworth, 290 U. S. 365, 370, 78 L. Ed.
365, 368;

Commissioner v. Branch, (C. C. A. 1) 114 F. 2d 985,
132 A. L. R. 839;

Commissioner v. O'Donnell, (C. C. A. 9)90 F. 2d 907.

In *U. S. v. Spalding*, 97 F. 2d 701, cert. den. 305 U. S. 644, a tax case decided by this court, appellee Spalding made equitable assignment to Salisbury and Lovett of part of his beneficial interest in a certain oil lease agreement. This court held that income therefrom was taxable to the beneficial holders, Salisbury and Lovett, and that appellee Spalding was entitled to recover a refund from the government as to income tax paid by him based thereon. This court also distinguished *Lucas v. Earl* and similar cases which are relied upon by defendant herein, but which are clearly and obviously distinguishable upon the facts. Judge Mathews, speaking for this court, said:

"In determining appellee's tax liability for 1930, the Commissioner of Internal Revenue included as part of appellee's gross income the \$17,765.64 which the Oil Company paid to Salisbury and Lovett in that year. Appellee contended that this was not income to him and should not have been so included. The trial court upheld appellee's contention and, we think, properly so. Salisbury and Lovett *were entitled to receive, and did receive, this money. It was not payable to or receivable by appellee, and was not so paid or received. It was not appellee's money, consequently, was not income of appellee.* *Blair v. Commissioner*, 300 U. S. 5, 11, 57 S. Ct. 330, 332, 81 L. Ed. 465.

"Cases cited by appellant *are readily distinguishable.* In *Lucas v. Earl*, 281 U. S. 111, 50 S. Ct. 241, 74 L. Ed. 731; *Wehe v. McLaughlin*, 9 Cir., 30 F. 2d 217; and *Daugherty v. Commissioner*, 9 Cir., 63 F. 2d 77, the taxpayer had, in each case, made an agreement with his wife whereby his future earnings were to be received and owned by them jointly. In *Ward v. Commissioner*, 9 Cir., 58 F. 2d 757, and in *Bing v. Bowers*, 2 Cir., 26 F. 2d 1017, the taxpayer had assigned future rentals, but had not assigned the lease or transferred the leased property, or any interest therein, to his assignee. In *Leydig v. Commissioner*, 10 Cir., 43 F. 2d 494, the claimed assignment was of royalties under oil and gas leases to be executed in the future. *These cases, obviously, are not in point.*"

In *Blair v. Commissioner*, 300 U. S. 5, 81 L. Ed. 465, 57 S. Ct. 330, the court said:

"The Government points to the provisions of the revenue acts imposing upon the beneficiary of a trust the liability for the tax upon the income distributable to the beneficiary. But the term is merely descriptive of the one entitled to the beneficial interest. These provisions cannot be taken to preclude valid assignments of the beneficial interest, or to affect the duty of the trustee to distribute income to the owner of the beneficial interest, whether he was such initially or

becomes such by valid assignment. *The one who is to receive the income as the owner of the beneficial interest is to pay the tax.* If under the law governing the trust the beneficial interest is assignable, and if it has been assigned without reservation, the assignee thus becomes the beneficiary and is entitled to rights and remedies accordingly. We find nothing in the revenue acts which denies him that status. . . .

“The will creating the trust entitled the petitioner during his life to the net income of the property held in trust. He thus became the owner of an equitable interest in the corpus of the property. (Citing cases). By virtue of that interest he was entitled to enforce the trust, to have a breach of trust enjoined and to obtain redress in case of breach. The interest was present property alienable like any other, in the absence of a valid restraint upon alienation. (Citing cases). . . . The assignment of the beneficial interest is not the assignment of a chose in action but of the ‘right, title and estate in and to property.’ (Citing cases).”

“We conclude that the assignments were valid, that *the assignees thereby became the owners of the specified beneficial interests in the income, and that as to these interests they and not the petitioner were taxable for the tax years in question.*”

For the foregoing reasons the District Court was clearly in error in holding that the profit on the 7500 shares was taxable to the Holding Company and not to the Bank. The case should be reversed on plaintiff’s appeal.

10.

MILLER STOCK WAS NOT TAXABLE TO HOLDING COMPANY

In closing we shall briefly refer to the Miller trans-

action and the fraud penalty which are involved on the defendant's appeal. There can be no question but that the District Court was clearly right in holding that the profit realized from the sale of the 3500 Miller shares was in any event clearly taxable to the Bank and not to the Holding Company. As to the Miller stock it will be borne in mind that this was never issued to the Holding Company and was never even in its possession. No written record whatever was made on the Holding Company books with reference to this stock. As to this stock the District Court in its opinion well said (Tr. 474):

"I am convinced that the plaintiff has sustained its burden of proof as to the stock which was acquired from Alex Miller. As to that transaction the oral evidence is not contradicted by anything in writing. There were no entries made upon the Holding Company's books until after the transaction was completed and they were set up in such a way as to be susceptible of either interpretation. The only written evidence which detracts from this conclusion is in the minutes of the Holding Company's executive committee which provided that the Bank would take over the Miller stock at \$15 a share instead of \$12 a share as it later did. I have decided to resolve that doubt in favor of the plaintiff and to conclude that the use of the figure 15 was an error in the minutes. Having reached this conclusion, it follows that in so far as tax was levied on the profit accruing from the sale of the 3500 shares out of the Miller stock the assessment was erroneous."

The agreement as to the Miller stock is clearly shown by the written letters of December 11, 1934. (Pl. Ex. 16, 17, 18, Tr. 312). This agreement was fully carried out and

performed by all parties. With reference to this stock the District Court in its findings of fact expressly found:

"No entries were made in the books of the Holding Company with reference to the Alex Miller transaction or the said 5000 shares of Sunshine stock; and the stock never stood in the name of the Holding Company.

"That the income or profit on all of the stock, both the 7500 block and the 3500 block, was actually received and retained by the Bank.

"The transaction with Alex Miller with reference to the 5000 shares of Sunshine stock was originally in December, 1934, and at all times, made, agreed upon, consummated and put through for the benefit of the Bank. The reason for the method used in handling the transactions was that the parties realized the restrictions upon national banks in the purchase of stock in corporations. The transactions were not handled in that manner in order to evade or reduce payment of income taxes of either the Bank or the Holding Company.

"The transaction as to the 7500 shares of Sunshine stock and the said Alex Miller transaction as to said 5000 shares of Sunshine stock were at all times two separate and distinct transactions. The 5000 shares of Alex Miller Sunshine stock were never in the possession of the Holding Company.

"The court finds that the said 5000 shares of Sunshine stock was acquired from Alex Miller for the Bank, and the Holding Company acted in a trust capacity for, or as the agent of, the Bank and that at all times until the sale thereof the actual, equitable and beneficial owner and holder of the said 5000 shares of Sunshine stock was the Yakima First National Bank and was not the Holding Company." (Tr. 490-492)

These findings of the court are clearly supported by the overwhelming and undisputed evidence in this case,

and the court's conclusions with reference thereto are clearly correct for the reasons and under the authorities hereinabove referred to.

11.

FRAUD PENALTY WAS ILLEGALLY ASSESSED BY COMMISSIONER

This is not an issue raised by defendant on this appeal under its statement of points. (Tr. 505, 518) As we understand, it is therefore not involved on either of these appeals. However, in passing we shall briefly refer to the facts and legal authorities supporting the court's conclusion that the 50% fraud penalty was illegally assessed by the Commissioner.

Under the statute, 26 U.S.C.A. 293b, a 50% fraud penalty may be imposed only "if any part of any deficiency is due to fraud with intent to evade tax."

Here it is undisputed that there was no fraud on the part of anyone, and there was no intent to evade or reduce any tax whatsoever on the part of anyone. As to this the District Court in its detailed opinion on the facts (Tr. 464) well said:

"Keeping in mind the nature of the fraud necessary to sustain the fraud penalty in a tax case, I can see no testimony of fraud here. The fraud referred to is the fraud in making the return. The standard is whether, at the time the return is made, the taxpayer knew that it owed the tax and fraudulently failed to report it. A transaction may be entirely fraudulent (I am not

saying that this one was) and still not support a fraud penalty. It did not appear to me from the argument of counsel for the defendant at the time of the trial or in the brief that defendant was seriously urging now that this fraud penalty should be sustained."

In its final opinion (Tr. 479) the District Court said:

"Plaintiff is entitled to recover the amount paid on the fraud penalty. On this question, the burden rests with the defendant. The fraud meant in the statute is actual, intentional wrong-doing and the intent required is the specific purpose to evade the tax believed to be owed. *Griffiths v. Commissioner*, 50 F. 2d 782; *Duffin v. Lucas*, 55 F. 2d 786; *Mitchell v. Commissioner*, 118 F. 2d 308. The defendant submitted no testimony on this point but asks me to conclude from the transaction that plaintiff must have had fraudulent intent at the time of making the return. Such a conclusion is not justified. After all, this income was reported. The report as to its receipt was made by the wrong company. While it may have been negligently made, that is not sufficient to support the conclusion of fraudulent intent."

In its findings of fact on this point the District Court found:

"That there was no fraud or bad faith on the part of any of the said corporations or their officers or agents with reference to any of the transactions involved herein, and no fraud or bad faith in making any of the income tax returns of any of said corporations for the year 1935. At the time the said income tax returns for 1935 were made, the Holding Company, its officers and agents, did not know that it owed any taxes upon income derived from any of the transactions involved herein, and bona fide believed that all of the profit belonged to the Bank and said taxpayer did not fraudulently or knowingly fail to report any income or profit derived from any of the transactions

involved herein. That by reason thereof, no fraud penalty could properly be assessed against any of said corporations, including the Holding Company, with reference to any of the transactions involved herein. There was no wrong-doing on the part of any of the said corporations, including the Holding Company, or its officers or agents, in connection with any of the transactions involved herein, and there was no purpose or intention on the part of the Holding Company or its officers or agents or any of the corporations referred to herein to evade any tax believed by said parties to be owed to the defendant; and there was no fraudulent intent whatsoever by any of said parties with reference thereto." (Tr. 493)

See the authorities cited in the court's opinion, *supra*, and see also to the same effect the following:

Budd v. Commissioner, (C. C. A. 3) 43 F. 2d 782, 786;

DeLone v. Commissioner, (C. C. A. 3) 110 F. 2d 507, 509;

Rogers Recreation Co. v. Commissioner, (C. C. A. 2) 103 F. 2d 780, 782, 783;

Commissioner v. Woods Machinery Co., (C. C. A. 1) 57 F. 2d 635, 636, cert. den. 287 U. S. 613;

Jenison v. Commissioner, (C. C. A. 5) 45 F. 2d 4, 5, 6;

U. S. v. National City Bank, 21 Fed. Supp. 791, 797;

Hartford-Connecticut Trust Co. v. Eaton, (C. C. A. 2) 34 F. 2d 128, 130;

26 U. S. C. A. 1112.

Clearly therefore the District Court was right in finding and holding that there was no fraud, no intent to evade or reduce taxes, and consequently no right to assess the fraud penalty.

ACTION LIES UNDER TUCKER ACT

It is, we believe, undisputed that if, as we have shown, these taxes and penalties were illegally assessed, plaintiff has a right to recover the same, together with interest, herein under the Tucker Act.

28 U. S. C. A. sec. 41 (20);

C. T. C. Investment Co. v. U. S., (C. C. A. 7) 108 F. 2d 383;

U. S. v. Bertelsen & Peterson Engineering Co., 306 U. S. 276, 83 L. Ed. 647, affirming 97 F. 2d 488 and 98 F. 2d 132;

U. S. v. Piedmont Manufacturing Co., (C. C. A. 4) 89 F. 2d 296, and cases there cited, affirming 15 Fed. Supp. 581;

A. S. Kreider Company v. U. S., (C. C. A. 3) 117 F. 2d 133, 137;

Moses v. U. S., (C. C. A. 2) 61 F. 2d 791, 793, cert. den. 289 U. S. 743.

We therefore respectfully submit that both the 7500 share and 5000 share blocks of stock were purchased and held by the Holding Company in trust for the Bank, or as agent for the Bank, that the Bank was the sole beneficial, equitable owner thereof, that the profit received by the Bank from the sale thereof was income of the Bank and therefore properly taxable to it and not to the Holding Company. The case should therefore be reversed on plain-

tiff's appeal and affirmed on defendant's appeal and judgment entered in favor of the plaintiff against the defendant for the full amount sued for, \$26,933.86, together with interest thereon at 6% per annum from the date of payment, May 27, 1938, until paid, together with plaintiff's costs.

Respectfully submitted,

CHENEY & HUTCHESON

JOSEPH C. CHENEY

ELWOOD HUTCHESON

*Attorneys for Appellant and
Cross-Appellee, Guaranty Trust
Company, as Liquidating Trust-
tee of Yakima Holding Corpora-
tion*

APPENDIX

In *Adamson v. Black Rock Power & Irrigation Co.*, (C. C. A. 9) 297 Fed. 905, decree affirmed, 16 F. 2d 114, the instrument in question, although not expressly declaring a trust, provided that certain property was "pledged" for the performance of certain water right contracts. This court held that the property was subject to a perpetual trust for that purpose, saying:

"As we view this instrument in the light of the circumstances of its execution and thereafter, the statements, reservations, stipulations, and contract therein constitute a declaration by the Hanford Company that it holds these instrumentalities in trust to the extent necessary for the purpose of water supply to prospective vendees of its lands, and that the vendees in the vendor settlor of the trust may repose confidence it forever will apply said instrumentalities to their use and benefit.

"It is hornbook law that trusts may be thus declared, or in several writings and less formal, or in writings not contemporaneous or not inter partes; that in creation they need no particular, formal, or technical words, no set phrases, and require only that they be in praesenti, expressed in unequivocal language, admit of but one reasonable interpretation; and that settlor, intent, property, object, consideration and beneficiaries appear with reasonable certainty. This trust deed satisfies every requirement of equity to constitute a declaration of trust as aforesaid. In so far as terms are concerned, they might be proven by parol, and are found in the deeds of the lands to the vendees for whose benefit the trust was created."

Also directly in point is the decision of this court in the tax case of *Portland Cremation Assoc. v. Commissioner*

of *Internal Revenue*, (C. C. A. 9) 31 F. 2d 843. Deeds to patrons of the crematorium contained no reference to a maintenance fund, but pursuant to a resolution of the directors it was represented to purchasers that 20% of gross receipts would be set aside for perpetual care and maintenance of crematory urns. This court held that this constituted a trust and was therefore a proper deduction for income tax purposes. Judge Gilbert speaking for this court said:

"But a trust may be created by parol, and its creation does not depend on the use of particular words of trust. Chicago, etc., Ry. Co. v. Des Moines, etc., Ry Co., 254 U. S. 196, 208, 41 S. Ct. 81, 65 L. Ed. 219. It may be inferred from facts and circumstances. Thus the owner and donor of personal property may create a perfect trust by his unequivocal declaration in writing or by parol that he himself holds such property in trust for purposes named. 26 R. C. L. 1182. And any words which indicate with sufficient certainty a purpose to create a trust will be effective in so doing. Gutch v. Fosdick, 48 N. J. Eq. 353, 22 A. 590, 27 Am. St. Rep. 473; Faulds v. Dillon, 231 Mich. 509, 204 N. W. 733. While the petitioner here may be said to have had control of the money which it had placed in the maintenance fund, diversion of that fund for corporation purposes or any purpose other than that designated by its promise to maintain the same, and the specific resolution of its board of directors to devote to that purpose 20 per centum of its receipts from sales, might be enjoined by a suit in equity as a violation of the trust agreement. The crucial question is, Did the petitioner's patrons possess the right to protect themselves and demand the preservation of the fund which the petitioner had covenanted with them to maintain and by its resolution had set apart for maintenance? That question is by the authorities answered in the affirmative. 26 R. C. L. 1359; Rodney v. Shankland, 1 Del.

Ch. 35, 12 Am. Dec. 70; *Linneman v. Moross*, 98 Mich. 178, 57 N. W. 103, 39 Am. St. Rep. 528."

In 26 R. C. L. 1182 therein cited the well settled rule is stated as follows:

"The owner and donor of personal property may create a perfect or complete trust, by his unequivocal declaration in writing, or by parol, that he himself holds such property in trust for the purposes named. The crucial question where a voluntary trust in the settlor is sought to be established is whether the declaration on which such trust is sought to be predicated is sufficient. There is no prescribed form for the declaration of a trust; whatever evinces the intention of the party that the property of which he is the legal owner shall beneficially be another's is sufficient."

In *Chicago, etc., Ry. Co. v. Des Moines, etc., Ry Co.*, 254 U. S. 196, 65 L. Ed. 219, 41 S. Ct. 81, *supra*, the court said:

"It needs no particular form of words to create a trust, so there be reasonable certainty as to the property, the objects, and the beneficiaries. *Colton v. Colton*, 127 U. S. 300, 310, 32 L. Ed. 138, 142, 8 Sup. Ct. Rep. 1164. . . . But it is not necessary that the trust be expressed in the same instrument that transfers the title. Various instruments may be read together in order to ascertain the intention to establish one. *Loring v. Palmer*, 118 U. S. 321, 340, 30 L. Ed. 211, 218, 6 Sup. Ct. Rep. 1073."

Also directly in point is the tax case of *O'Meara v. Commissioner of Internal Revenue*, (C. C. A. 10) 34 F. 2d 390. There the taxpayers transferred a certain oil lease to a corporation. Construing together the different instruments involved in the transaction, it appeared that the grantors reserved to themselves the equitable beneficial title, al-

though conveying the legal title to the corporation. The court held that this established a trust and was not a sale, as there was no transfer of the beneficial or equitable title even though there was a conveyance of the legal title, and consequently the transaction was not taxable. The court said:

"The declaration of trust need not be contained in the instrument which transfers the legal title. It may be set forth in a separate instrument or in several instruments, provided they are related to and connected with each other and, when construed together, establish the existence of the trust. (Citing cases). Therefore, as between the parties and the corporation, the proposal, the resolution of acceptance, the assignments and the certificate of stock constituted one transaction and the intent of the parties must be gathered from an examination of all of these instruments. We conclude that these instruments, considered together, manifest an intention to transfer to the corporation the legal title to the leases and personal property used in connection therewith, as a managing trustee, and to retain the equitable title to such property in the assignors. . . .

"It is our conclusion that the deficiencies should be set aside in so far as they were based upon the transfer of the oil and gas leases to the Orlando Company."

In *Foreman v. Foreman*, 251 N. Y. 237, 167 N. E. 428, Judge Cardozo speaking for the court said:

"The rule is now settled by repeated judgments of this court that the statute does not obstruct the recognition of a constructive trust affecting an interest in land where a confidential relation would be abused if there were repudiation, without redress, of a trust orally declared. (Citing cases). . . .

"The wife, far from attempting to rid herself of the trust because orally declared, submitted to it as completely as if seals and parchments had perfected the evidence of duty. Cf. *Bork v. Martin*, 132 N. Y. 280, 30 N. E. 584, 28 Am. St. Rep. 570. No objection was heard from her, or none that has been disclosed, when the husband gathered in the rents and used them for himself. *In its origin the trust was dependent for proof of its existence on nothing better than word of mouth. In the end, at her death, what was oral in its beginnings had been confirmed by part performance, with the result that conduct as well as words had become the signs of its creation.* *Jeremiah v. Pitcher*, 26 App. Div. 402, 49 N. Y. 788, affirmed 163 N. Y. 574, 57 N. E. 1113; *McKinley v. Hessen*, 202 N. Y. 24, 95 N. E. 32; *Burns v. McCormick*, 233 N. Y. 230, 135 N. E. 273. The wife would have been guilty of an abuse of confidence by disclaimer during life. Her heir will not be suffered to nullify her submission to the call of equity and honor by disclaimer after death. . . .

"It is reinforced by words of promise, by the relation of man and wife, and by unequivocal acts of confirmation and performance. In such circumstances, the plastic remedies of the chancery are moulded to the needs of justice. . . . What has been written assumes that the testimony of the plaintiff's witnesses is truthful and accurate. As to this there is a question of credibility which the trier of the facts, and not this court, must resolve."

Bearing in mind the rule of *Erie Ry. Co. v. Tompkins*, *supra*, in Washington, where these transactions occurred, these rules are fully recognized.

In *Tucker v. Brown*, 199 Wash. 320, 92 P. 2d 221, the court held that a trust existed as to a large amount of valuable property, although there was nothing whatever in writing signed by the alleged trustee, and there was no

testimony available from any party to the transaction, both of them being then deceased. The court said:

"An express trust is one created by the act of the parties; and, where a person has, or accepts, possession of money, promissory notes, or other personal property with the express or implied understanding that he is not to hold it as his own absolute property, but to hold and apply it for certain specified purposes, an express trust exists. Farrell v. Mentzer, 102 Wash. 629, 174 Pac. 482; 65 C. J. 295; Allen v. Hendrick, 104 Ore. 202, 206 Pac. 733.

'A person occupying a fiduciary relation, who has property deposited with him on the strength of such relation, is to be dealt with as trustee of an express trust. Moulden v. Train, 199 Mo. App. 509, 204 S. W. 65.'

In *Holmes v. Holmes*, 65 Wash. 572, 118 Pac. 733, the court said:

"The important and decisive question in the case is, can an express trust be proven by a writing signed by the trustee. We think the question must receive an affirmative answer. . . .

"In Barrell v. Joy, 16 Mass. 220, it is said: 'But it seems to be settled, by authorities cited at the bar, that any declaration in writing, made by the grantee or assignee of property, at any time after the conveyance, is competent proof that the property was to be holden in trust according to the terms of such declaration, within a fair and liberal construction of the statute of frauds; and that letters or other papers, however informal, are sufficient to constitute such declaration.'"

NO. 10,356

IN THE

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

GUARANTY TRUST COMPANY, a corporation, as
liquidating trustee of Yakima Holding Corporation,
Appellant

v.

UNITED STATES OF AMERICA,

Apellee

And

UNITED STATES OF AMERICA,

Appellant

v.

GUARANTY TRUST COMPANY, a corporation, as
liquidating trustee of Yakima Holding Corporation,
Apellee

On Appeals from the District Court of the United
States for the Eastern District of Washington

BRIEF FOR THE UNITED STATES

SAMUEL O. CLARK, JR.,
Assistant Attorney General.

SEWALL KEY,

J. LOUIS MONARCH,

S. DEE HANSON,

*Special Assistants to the
Attorney General.*

EDWARD M. CONNELLY,
United States Attorney.

HARVEY ERICKSON,
Assistant United States Attorney.

THOMAS R. WINTER,
*Special Assistant to the Chief Counsel,
Bureau of Internal Revenue.*

FILED

JUN 21 1943

PAUL P. O'BRIEN,
CLERK



INDEX

	Pages
Opinion below.....	1
Jurisdiction	1
Question presented	2
Statute and other authorities involved.....	3
Statement	3
Summary of argument.....	15
Argument:	
I. The 7,500 shares of Sunshine stock be- longed to the Holding Company, and therefore the profit realized on the sale thereof in 1935 constituted taxable in- come to it in that year.....	17
II. The remaining 3,500 shares of Sunshine stock in question likewise in fact be- longed to the Holding Company, and therefore the profit realized on the sale thereof in 1935 also constituted taxable income chargeable to it in that year.....	22
III. There was no valid trust.....	23
IV. Any interest of the Bank was confined to the proceeds of the sale of the stock....	28
Conclusion	34
Appendix	35

CITATIONS

	Pages
Cases:	
<i>Awotin v. Atlas Exchange Bank</i> , 295 U. S. 209.....	25-26
<i>California Bank v. Kennedy</i> , 167 U. S. 362.....	26
<i>Coleman v. S. R. T. R. Co.</i> , 49 Cal. 517.....	27
<i>Commissioner v. Burdette</i> , 69 F. 2d 410.....	21
<i>Commissioner v. Gerard</i> , 75 F. 2d 542.....	21

<i>Commissioner v. Neaves</i> , 81 F. 2d 947.....	21
<i>Concord First National Bank vs. Hawkins</i> , 174 U. S. 364.....	26
<i>Corliss v. Bowers</i> , 281 U. S. 376.....	33
<i>First Nat. Bank v. Nat. Exchange Bank</i> , 92 U. S. 122.....	26
<i>First Nat. Bank in Wichita v. Commissioner</i> , 46 F. 2d 283.....	31
<i>Helvering v. Horst</i> , 311 U. S. 112.....	33
<i>Helvering v. Rankin</i> , 295 U. S. 123.....	21
<i>Lucas v. Earl</i> , 281 U. S. 111.....	29, 33
<i>Old Mission P. Cement Co. v. Commissioner</i> , 69 F. 2d 676.....	21
<i>Park's Estate, In re</i> , 58 F. 2d 965.....	31
<i>Phillips v. Commissioner</i> , 283 U. S. 589.....	21
<i>Prey Bros. Live Stock Commission Co. v. Com- missioner</i> , 36 F. 2d 326.....	21
<i>Tidwell v. Anderson</i> , 72 F. 2d 684.....	21

Statutes:

Revenue Act of 1934, c. 277, 48 Stat. 680, Sec. 22	27, 35
Revised Statutes, Sec. 5136, as amended by Act of June 16, 1933, c. 89, 48 Stat. 162 (U. S. C. 1940 ed., Title 12, Sec. 24).....	23-24, 26, 35-36

Miscellaneous:

Federal Rules of Civil Procedure, Rule 52 (a)	21
G. C. M. 4015, VII-1 Cum. Bull. 120 (1928).....	31
Restatement of the Law of Trusts, Sec. 117	27, 36-37
Treasury Regulations 86, Art. 22 (a)-17.....	31, 36

NO. 10,356

IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GUARANTY TRUST COMPANY, a corporation, as
liquidating trustee of Yakima Holding Corporation,
Appellant

v.

UNITED STATES OF AMERICA,

Apellee

And

UNITED STATES OF AMERICA,

Appellant

v.

GUARANTY TRUST COMPANY, a corporation, as
liquidating trustee of Yakima Holding Corporation,
Apellee

On Appeals from the District Court of the United
States for the Eastern District of Washington

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the District Court (R. 465-480) is
reported in 44 F. Supp. 417.

JURISDICTION

These cases¹ represent an appeal taken by the Guar-
anty Trust Company, as liquidating trustee of the

¹A stipulation entered into between the parties hereto,
filed with and approved by this Court, provides that both ap-
peals herein may be consolidated for purposes of briefing,
argument, hearing and decision, as the taxpayer states. (Br.
23.)

Yakima Holding Corporation, and a cross-appeal by the United States from the judgment entered July 31, 1942, by the District Court in favor of the Trust Company in the sum of \$12,793.04, with interest according to law and costs (R. 498-499), in an action, tried without a jury (R. 480), filed by the Trust Company to recover corporate income and excess profits taxes, penalties and interest paid by the taxpayer in the aggregate sum of \$26,933.86 for the calendar year 1935 (R. 3-15). The action arose and jurisdiction in the District Court was vested under Section 24, Twentieth, of the Judicial Code, as amended, and Section 3772 of the Internal Revenue Code. (R. 3.) The cases are brought to this Court by notices of appeal filed by the United States (R. 505) and by the Guaranty Trust Company (R. 499-500) on October 27 and 28, 1942, respectively. The jurisdiction of this Court is invoked by virtue of the provisions of Section 218(a) of the Judicial Code, as amended.

QUESTION PRESENTED²

Whether the entire profit realized from the sale in the taxable year 1935 of 11,000 shares of Sunshine Mining Company stock was properly chargeable and taxable to the Yakima Holding Corporation in that year, as contended by the Government, or to the Yakima First National Bank, its wholly owned subsidiary, as contended by the Guaranty Trust Company.

²Another question—involving the imposition of fraud penalties upon the taxpayer, under Section 293(b) of the Revenue Act of 1934 (R. 11, 20, 22)—was decided favorably to the Guaranty Trust Company (R. 464-465, 479-480, 495-496) but was not appealed by the Government.

STATUTE AND OTHER AUTHORITIES INVOLVED

The pertinent statute and other authorities are set forth in the Appendix, *infra*.

STATEMENT

The pertinent facts were found by the District Court substantially as follows (R. 481-492, 494-496) :

At all times herein mentioned the Guaranty Trust Company (hereafter called the Trust Company) was and now is a corporation duly organized and existing under and by virtue of the laws of the State of Washington, and engaged in transacting and duly authorized and qualified to transact a trust company business. Its principal place of business is situated in the city of Yakima, Yakima County, Washington (R. 481.)

At all times from 1930 until 1937, the Yakima Holding Corporation (hereafter called the Holding Company) was a corporation duly organized and existing under and by virtue of the laws of the State of Washington, with its principal place of business at Yakima, Yakima County, Washington. The Holding Company was duly disincorporated and dissolved during the year 1937 pursuant to the laws and statutes of the State of Washington. Prior to its dissolution and on or about November 10, 1936, all of the assets, funds and property of every kind and character whatsoever of the Holding Company were duly transferred, assigned and conveyed to the Guaranty Trust Company as liquidating trustee, and at all times there-

after the latter company has been and now is the duly appointed, qualified and acting liquidating trustee of the Holding Company. (R. 482.)

During 1935 and for a number of years both prior and subsequent thereto, the Yakima First National Bank (hereafter called the Bank) was a duly organized and existing national banking association engaged in transacting business at Yakima, Yakima County, Washington, as a national bank. During the years 1934 and 1935, the Holding Company was a holding corporation owning practically all of the stock of each the Bank, the First National Bank of Wapato, a national banking association located at Wapato, Yakima County, Washington, and the Guaranty Trust Company, except directors' qualifying shares in each of these banks and the Trust Company. (R. 482-483.)

The officers of all four corporations were practically identical and the majority of the directors and members of the executive committees thereof were identical. All of the corporations were dominated by R. M. Hardy and a small group of associates. R. M. Hardy was president of each of the corporations and was also president of Sunshine Mining Company (hereafter referred to as Sunshine), a prosperous mining corporation. During the time herein involved, the Bank had not recovered from the losses sustained during the depression of the preceding years, and by reason thereof the capital of the Bank was impaired and there was insistence by the National Banking Department that the Bank strengthen its financial position. During the time immediately preceding the

transactions involved herein, there occurred a phenomenal activity in the stock of Sunshine which pointed to the situation which later developed of a very rapid substantial appreciation of the market value of Sunshine stock. (R. 483.)

In August, 1934 the Holding Company, which was then indebted to the Bank in the sum of \$60,000, and which at that time received \$75,000 in cash from R. M. Hardy, purchased 7,500 shares of Sunshine stock, of which 5,000 shares were taken in the name of the Bank and 2,500 shares were taken in the name of George Bradshaw, who was the secretary of the Holding Company and also a director and member of the executive committee of the Bank, as a street name. The Holding Company paid the purchase price or cost of the 7,500 shares of Sunshine stock in the sum of \$59,576.50. On December 12, 1934, an agreement was entered into between the Holding Company and the Bank, executed in the form of an accepted letter, as follows (R. 484-486):

Yakima Holding Corporation
Yakima, Washington
December 12, 1934

Yakima First National Bank
Yakima, Washington
Gentlemen:

In order to confirm an understanding we have had with the bank regarding the purchase of 7500 shares of Sunshine Mining Company stock, I thought it advisable to write this letter. It was understood that this stock was to be purchased by the Yakima Holding Corporation and held by

it for the account of the bank. The Yakima Holding Corporation was to be reimbursed for the amount actually paid for the stock, plus a small appreciation to be determined at the end of the year if this should be deemed necessary. We, therefore, treated this stock as being held for the bank, and if any loss results it is to be the loss of the bank and, of course, in any profit results it will likewise accrue to the bank.

I am taking this opportunity also of setting out the understanding reached in connection with the proposal submitted by us to Mr. Alexander Miller to exchange 4000 shares of stock of the Yakima Holding Corporation for 5000 shares of stock of the Sunshine Mining Company. We are doing this on the express understanding that stock of the Sunshine Mining Company will be taken over by the bank at the stipulated price of \$12.00 per share. This understanding is to apply to any further similar transactions.

I would ask you to signify that this is also in accordance with your understanding of these transactions by signing the acknowledgment on the bottom of this letter.

Yours very truly,

GEO. H. BRAWSHAW,

Secretary.

The above represents the understanding that has been reached between the bank and the Yakima Holding Corporation with respect to the matters set out above and the same is hereby approved.

YAKIMA FIRST NATIONAL BANK,

By H. F. CRAWFORD,

Cashier.

On January 6, 1935, an entry was made in the books of the Holding Company showing the "appreciation write-up" as to the 7,500 shares at the rate of 25 cents per share in the sum of \$1,875, in accordance with the above agreement; and the latter amount was reported as income of the Holding Company in its income tax return for 1935 as profit on the sale of stock. The Holding Company received and retained the dividends paid upon the Sunshine stock herein referred to until it was delivered to the Bank and sold by the Bank in April, 1935; and the Holding Company reported the dividends in its income tax return, as its income, in accordance with the verbal understanding between the Bank and the Holding Company. (R. 486.)

On February 5, 1935, at the annual stockholders' meeting of the Holding Company, the financial statement of the Holding Company was presented which, among other things, in the list of assets provided as follows: "Other stock investments, \$61,451.50," which included and referred to the investment in the above-mentioned 7,500 shares of Sunshine stock. No reference was made in the minutes of the stockholders' meeting to the stock being held by the Holding Company in trust or as trustee for the Bank, or that such stock had been sold to the Bank. (R. 486-487.)

On April 12, 1935, a meeting of the executive committee of the Holding Company was held, and the minutes of the meeting provide in part as follows (R. 487-488):

Mr. Hardy stated there were several matters that required action by the executive committee and stated that the first matter was a proposal to Mr. Alex Miller to exchange 4000 shares of stock of the Yakima Holding Corporation for 5000 shares of Sunshine Mining Company stock on the basis of placing a value of \$15.00 per share on the stock of the Holding Corporation and \$12 per share on the stock of the Sunshine Mining Company. This proposal was made to Mr. Miller under date of December 11, 1934, and accepted by him. It was then moved by Mr. Clift, seconded by Mr. Rightmire, that we approve and ratify the proposal for the exchange of stock as outlined and authorize its completion. Carried.

The secretary then stated that at the time this transaction with Mr. Miller was discussed by the officers an understanding was reached that if the transaction were completed that the Yakima First National Bank would take over from the Yakima Holding Corporation the 5000 shares of Sunshine at \$15.00 per share; also the 7500 shares of Sunshine stock already owned by the Yakima Holding Corporation at the cost price of same, all in accordance with a letter setting out this understanding dated December 12, 1934, from the secretary to the bank and approved by the bank.

It was then moved by Mr. Rightmire, seconded by Mr. Clift, that the arrangements between the Holding Corporation and the bank as outlined by the secretary be approved and ratified, which motion being put was unanimously approved.

The use of the figure \$15 per share in reference to the 5,000 shares of Sunshine stock in the minutes of the Holding Company executive committee for the

meeting of April 12, 1935, was based upon inadvertent error and mistake, and the correct amount thereof was in truth and in fact \$12 per share, and the Miller transaction was carried out upon the basis of \$12 per share paid to Miller for the 5,000 shares of Sunshine stock, rather than \$15 per share. (R. 488.)

At the time of the purchase of the 7,500 shares of stock, entries were made with reference thereto on the books of the Holding Company in its ledger account and its cash disbursement journal, entitled "Sunshine Mining Co. stock." The ledger entries with reference thereto have as specifically designated items on the ledger page the initials Y F N B for the description of the number of shares and the price paid for each share. Other sheets of the ledger show that almost without exception similar designations were placed in front of the descriptions of property, the title of which was concededly in the Holding Company. (R. 488-489.)

In April, 1935, the 7,500-share block of Sunshine stock was sold by the Bank for \$135,835.54. The cost of such stock to the Holding Company was \$59,576.50, making a gross profit on the purchase and sale, if the stock and the profit thereon belonged to the Holding Company, of \$76,259.04. The cost of such stock to the Bank was \$61,451.50 (being the amount the Bank agreed to pay the Holding Company and the amount of interest therein reported by the Holding Company to its stockholders), making the gross profit on the purchase and sale, if the stock

belonged to the Bank in 1935, \$74,384.04. The court found that such profit constituted income of the Holding Company for the year 1935 and not income of the Bank. (R. 489.)

On December 11, 1934, the Holding Company wrote to Alex Miller offering to exchange 4,000 shares of stock in the Holding Company, on the basis of \$15 per share, for 5,000 shares of Sunshine stock on the basis of \$12 per share. By letter of December 11, 1934, Miller accepted this offer and on the same date he deposited with the Trust Company his certificate for 5,000 shares of the Sunshine stock, authorizing the Trust Company to deliver it to the Holding Company in exchange for 4,000 shares of stock in the Holding Company. Mr. Miller's letter imposed a condition of the exchange, but the court below found that such condition and proviso were waived by Mr. Miller and that he consented that the exchange deal be consummated without compliance with any condition. (R. 489-490.)

On December 12, 1934, the Holding Company by its secretary, George H. Bradshaw, wrote the above-quoted letter of that date to the Bank. The foregoing agreement was executed and delivered on December 12, 1934, and was performed. (R. 490.)

No entries were made in the books of the Holding Company with reference to the Alex Miller transaction or the 5,000 shares of Sunshine stock, and the stock never stood in the name of the Holding Company. (R. 490.)

In April, 1935, the 7,500 shares and 5,000 shares of Sunshine stock hereinabove referred to, or a total of 12,500 shares which had been theretofore delivered to the Bank, were delivered by the Bank to Drumheller, Ehrlichman & White, a stock brokerage concern, who sold 11,000 shares thereof on the instruction of the Bank. The brokers paid to the Bank therefor \$135,835.54 as the net proceeds of sale of the 7,500 shares of Sunshine stock, and \$63,389.91 as the net proceeds of sale of the 3,500 shares of Sunshine stock which constituted a part of the block of 5,000 shares acquired from Alex Miller, or a total selling price of the 11,000 shares in the sum of \$199,225.45. The remaining 1,500 shares of the Sunshine stock were duly redelivered to the Bank by the brokers. (R. 490-491.)

Out of the proceeds of the sale the Bank paid Miller for the 5,000 shares of Sunshine and paid the Holding Company the amount which it had paid for the 7,500 shares, its costs incurred, and the 25 cents per share appreciation, all in accordance with the agreement of December 12, 1934. (R. 491.)

The selling price of the 3,500 shares, or the net proceeds of the sale thereof, was \$63,389.91, and the cost or purchase price thereof was \$42,000. The resulting profit on the purchase and sale of the 3,500 shares of Sunshine stock was \$21,389.91. The income or profit on all of the stock, both the blocks of 7,500 and 3,500 shares, was actually received and retained by the Bank. (R. 491.)

The transaction with Alex Miller with reference

to the 5,000 shares of Sunshine stock was originally in December, 1934, and at all times made, agreed upon, consummated and put through for the benefit of the Bank. The reason for the method used in handling the transactions was that the parties realized the restrictions upon national banks in the purchase of stock in mining corporations. The transactions were not handled in that manner in order to evade or reduce payment of income taxes of either the Bank or the Holding Company. (R. 492.)

The transaction as to the 7,500 shares of Sunshine stock and the Alex Miller transaction as to the other 5,000 shares of Sunshine stock were at all times two separate and distinct transactions. The 5,000 shares of Alex Miller Sunshine stock were never in the possession of the Holding Company. (R. 492.)

The court found that the 5,000 shares of Sunshine stock were acquired from Alex Miller for the Bank, and the Holding Company acted in a trust capacity for, or as the agent of, the Bank and that at all times, until the sale thereof, the actual, equitable and beneficial owner and holder of the 5,000 shares of Sunshine stock was the Yakima First National Bank and was not the Holding Company. (R. 492.)

Thereafter, in 1937, the United States Commissioner of Internal Revenue assessed a deficiency against the Trust Company for income tax [on the Holding Company's income (R. 445)] for the year 1935 in the sum of \$13,037.55, together with a 50%

fraud penalty thereon, under Section 293(b) of the Revenue Act of 1934, in the sum of \$6,518.78³, and a deficiency in excess profits tax against the Trust Company for the year 1935 in the sum of \$3,477.96, and a 50% fraud penalty thereon in the sum of \$1,738.98, or total additional tax in the sum of \$16,515.51, plus 50% fraud penalty thereon in the sum of \$8,257.76, or the total sum of \$24,773.27. (R. 494.)

Thereafter, in May, 1937, the Trust Company duly mailed and filed with the Commissioner of Internal Revenue, as provided by law, a written, sworn protest as to deficiency tax assessments and penalties, and sworn affidavits in support of the protest. The protest was overruled and denied by the Commissioner and the alleged tax deficiency assessments and penalties were ordered paid. On or about May 27, 1938, the Trust Company paid to the United States the sum of \$24,773.27, plus interest thereon in the sum of \$2,160.59 to such date, or a total payment of \$26,933.86, in payment of the alleged deficiency tax assessment and penalties as required by the Commissioner. (R. 494-495.)

Thereafter, on or about March 1, 1940, the Trust Company duly filed with the United States separate written, sworn claims for refund of the alleged additional taxes and penalties assessed against it. On or about October 4, 1940, the United States, through the Commissioner, disallowed and denied the claims for refund. (R. 495.)

³Any further facts relative to the penalties are included for purposes of clarity. See footnote 1.

The Collector of Internal Revenue by whom the income and excess profits taxes and penalties were collected from the Trust Company is not now in office as Collector of Internal Revenue and was not in office as such at the time of the commencement of this suit. The present United States Collector of Internal Revenue for the State of Washington took office as such only a few months prior to the commencement of this action. (R. 495.)

Upon the basis of the foregoing facts, the District Court held that the profit realized on the sale of the 7,500 shares of Sunshine stock was chargeable to the Holding Company and that the profit on the 3,500 like shares was chargeable to the Bank. (R. 465-480.) The court thereupon entered judgment accordingly (R. 498-499), from which both parties appealed (R. 499, 505).

STATEMENT OF POINTS TO BE URGED BY THE UNITED STATES

The District Court erred (R. 505-506, 518):

1. In holding that the Yakima First National Bank was the equitable owner of 3,500 shares of stock of the Sunshine Mining Company.

2. In not holding that the Bank was not entitled to purchase the Sunshine Company's shares for its own account.

3. In not holding that the Bank had no capacity to take legal title to the shares and, therefore, it

could not become the beneficiary of a trust for such property.

4. In holding that the Yakima Holding Corporation acted in a trust capacity for or as agent of the Bank, and that at all times until the sale thereof the actual, equitable and beneficial owner and holder of the 3,500 shares of Sunshine stock was the Yakima First National Bank, and not the Holding Company.

5. In entering judgment for the Guaranty Trust Company.

SUMMARY OF ARGUMENT

1. With respect to the 7,500 shares, the District Court was clearly correct in its decision that the taxpayer had failed to sustain its burden of establishing the existence of a trust. The actual handling of the matter by the parties was quite inconsistent with the contention that a trust existed. The evidence as to the existence of the trust is not persuasive, and the purchase of the stock by the Holding Company, its receipt of the dividends, and its treatment of the matter on its books and records are entirely consistent with the decision that no trust existed.

2. With respect to the 3,500 shares, the evidence shows that they were a part of the 4,000 shares acquired by the Holding Company from Mr. Miller and held in escrow until the delivery of the consideration. The evidence supporting the view that they

were held in trust by the Bank is not compelling and we submit that the District Court erred in holding that a trust was established.

3. As a matter of law there could be no trust in respect to either block of stock. The Holding Company was not authorized to act as trustee, and the Bank was precluded by statute from becoming the owner of the stock. Since the Bank had no capacity to take the legal title, it had no capacity to become the beneficiary of a trust of such property. In this view, the trust which the District Court found to exist was invalid and the Holding Company should therefore report the profit on the sale.

4. If any trust existed, the evidence is perfectly consistent with the view that the Bank's beneficial interest was solely in the proceeds of the sale. We submit that there was at most an agreement to assign the income to be realized from the sale and that upon settled principles an agreement of that kind does not relieve the Holding Company.

I.

ARGUMENT

THE 7,500 SHARES OF SUNSHINE STOCK BELONGED TO THE HOLDING COMPANY, AND THEREFORE THE PROFIT REALIZED ON THE SALE THEREOF IN 1935 CONSTITUTED TAXABLE INCOME TO IT IN THAT YEAR.

The taxpayer contends substantially that the 7,500 shares of Sunshine stock were purchased and held in trust by the Holding Company, under the agreement set forth in the letter of December 12, 1934, as agent and for the benefit of the Bank which was the sole equitable and beneficial owner thereof; that if the Holding Company had any title thereto at all, it was solely a legal title as trustee for the Bank (Br. 31-39); that since the agreement of December 12, 1934, was equally as binding upon the Government as on the Holding Company for tax purposes, the income realized from the sale of the stock in 1935 was properly taxable to and reported by the Bank in that year as the beneficial owner thereof (Br. 63-68); and that the District Court's findings of fact to the contrary are conclusions which are contrary to the evidence and erroneous, and should therefore be set aside by this Court (Br. 23-30).

We submit that the District Court's findings of fact supporting its conclusion that the Holding Company owned and was properly chargeable with the profit realized on the 7,500 shares, are based on ample substantial evidence, and that therefore the

findings and conclusion should be affirmed by this Court.

Thus, the court below found the following facts: The Holding Company purchased 7,500 shares of Sunshine stock in August, 1934 for \$59,576.50, of which 2,500 and 5,000 shares were taken in the names of its secretary as a street name, and the Bank, respectively. (R. 315⁴, 447⁴, 484⁴.) On December 12, 1934, the Holding Company entered into an agreement with the Bank evidenced by a letter of that date, accepted and acknowledged by the Bank, setting forth an understanding that 7,500 shares were to be purchased and held by the Holding Company for the account of the Bank and that the former was to be reimbursed by the Bank for the purchase price of the stock plus a small amount of appreciation to be determined at the end of the year, if necessary, any profit or loss resulting to be that of the Bank. (R. 315-316, 449, 484-485.) On January 6, 1935, an entry was made on the Holding Company's books (ledger and cash receipts journal) showing "appreciation write-up" in respect to the 7,500 shares at the rate of 25 cents a share in the sum of \$1,875, in accordance with the above agreement. (R. 448, 486.) The amount of the appreciation was reported by the Holding Company in the 1936 tax return as profit on the sale of the stock.

⁴The record citations in this paragraph covering pp. 481-496 refer to the District Court's finding of fact; those covering pp. 21-444 refer to the evidence supporting the findings; and those covering pp. 445-465 refer to the court's detailed opinion on the facts and factual conclusions.

(R. 486.) The Holding Company received and retained the dividends paid on the 7,500 shares from August 17, 1934, until the stock was delivered to and sold by the Bank in April, 1935. (R. 447, 486.) The Holding Company reported such dividends as income in its 1935 tax return, in accordance with the oral understanding with the Bank. (R. 486.)

At the Holding Company's annual stockholders' meeting on February 5, 1935, its financial statement as of January 7, 1935, was presented, setting forth in the list of its assets "Other Stock Investments, \$61,451.50" which represented its investment (purchase price, \$59,576.50, plus appreciation write-up of 25 cents a share, \$1,875) in the 7,500 shares, but no reference was made in the minutes that such stock was held by the Holding Company in trust or as trustee for the Bank or that the stock had been sold to the Bank. (R. 305, 451, 486-487.) The minutes of a meeting of the Holding Company's executive committee held on April 12, 1935, showed, among other things, that the Bank "would take over from the Yakima Holding Corporation * * * the 7,500 shares of Sunshine stock already owned by the Yakima Holding Corporation at the cost price of same," in accordance with the understanding contained in the letter of December 12, 1934. (R. 309, 454, 487-488.)

At the time of the purchase of the 7,500 shares in question entries were made on the Holding Company's books (ledger account and cash disbursement journal) entitled "Sunshine Mining Co. stock." (R.

447, 488.) Such entries were designated by the initials "YFNB" for the description of the number and price paid for each share, and similar designations were shown almost without exception on its books for the descriptions of all its other property, title of which was concededly in the Holding Company. (R. 447-448, 488-489.)

In April, 1935, the 7,500 shares of Sunshine stock which had theretofore been delivered by the Holding Company to the Bank were in turn delivered by the Bank to the stock brokerage concern, which sold them on the instruction of the Bank and paid the proceeds of the selling price thereof, \$135,835.54, to the Bank and the latter paid such amount plus the Holding Company's costs incurred and the 25% appreciation to the Holding Company, all in accordance with the agreement of December 12, 1934. (R. 485, 490-491.) The profit realized on the sale of the 7,500 shares constituted income to the Holding Company for the year 1935 and not income of the Bank. (R. 489.)

The foregoing negatives the taxpayer's contention that the District Court's finding No. 10 (R. 489) to the effect that the profit on the sale of the 7,500 shares constituted taxable income to the Holding Company for 1935 and not to the Bank (R. 489), is a conclusion and contrary to the overwhelming evidence and therefore should be reversed (Br. 23-30). It is apparent that the findings substantially to the effect that the stock was purchased and owned at all times by the Holding Company until the sale thereof

in 1935 and therefore the profit realized upon the sale constituted taxable income to it in that year, are supported by an abundance of substantial evidence. It is settled that they should therefore not be disturbed upon appeal. *Helvering v. Rankin*, 295 U. S. 123; *Phillips v. Commissioner*, 283 U. S. 589, 605.

Clearly, the facts found support the judgment in respect to taxability of the profit on the sale of the 7,500 shares and where as here the evidence does not compel a contrary conclusion, the appellate court is bound by the findings and conclusion of the trial court. Consequently, they may not properly be set aside (Rule 52(a), Federal Rules of Civil Procedure), as this Court and other courts have frequently held. *Commissioner v. Neaves*, 81 F. 2d 947, 949 (C. C. A. 9th); *Commissioner v. Gerard*, 75 F. 2d 542, 544 (C. C. A. 9th); *Old Mission P. Cement Co. v. Commissioner*, 69 F. 2d 676, 679 (C. C. A. 9th); *Commissioner v. Burdette*, 69 F. 2d 410, 411 (C. C. A. 9th); *Tidwell v. Anderson*, 72 F. 2d 684, 687 (C. C. A. 2d); *Prey Bros. Live Stock Commission Co. v. Commissioner*, 36 F. 2d 326, 327 (C. C. A. 10th).

II.

THE REMAINING 3,500 SHARES OF SUNSHINE STOCK IN QUESTION LIKEWISE IN FACT BELONGED TO THE HOLDING COMPANY, AND THEREFORE THE PROFIT REALIZED ON THE SALE THEREOF IN 1935 ALSO CONSTITUTED TAXABLE INCOME CHARGEABLE TO IT IN THAT YEAR.

The taxpayer makes substantially the same contentions with respect to the block of 5,000 shares⁵ of Sunshine stock as it does in connection with the 7,500 shares of like stock heretofore dealt with under heading I, *supra*, except that it does not challenge the District Court's findings in respect to the 5,000 shares. The argument is that the findings of the court below as to these shares are supported by substantial evidence, and therefore the court correctly held that the profit on the sale of 3,500 Miller shares in 1935 was taxable to the Bank in that year and not to the Holding Company. (Br. 68-71.)

While the court below held that the book entries of the Holding Company contradicted the oral evidence with respect to the ownership of the 7,500 shares and therefore the profit realized upon the sale thereof was taxable to the Holding Company, as heretofore shown, it nevertheless held that this was not true as to the profit on the 3,500 shares here in question. It held further that in the present

⁵All further references to the block of 5,000 shares of Sunshine Mining Company stock in the Miller transaction should be understood to refer to and include the 3,500-share block here in question which was sold in 1935, the latter having been a part of the former block of shares. (R. 491.)

transaction, separate and distinct from the 7,500-share transaction, the 5,000 shares were acquired from Miller by the Holding Company in a trust capacity for or as agent of the Bank, which was at all times the actual equitable and beneficial owner until the sale thereof in 1935 (R. 492), and that the evidence supported the Trust Company's contentions in so far as the ownership and taxability of the profit on the 3,500 shares were concerned. We think that the evidence does not compel that conclusion and that the District Court erred.

However the pivotal issue is whether the purported trust was valid.

III.

THERE WAS NO VALID TRUST

The Holding Company's charter and by-laws did not empower it to act as a trustee. (R. 289-298, 459, 476.) The Bank, moreover, was neither legally nor competent to purchase any of the Sunshine Mining Corporation stock for its own account. Revised Statutes, Section 5136 (Appendix, *infra*). That statute reads in part as follows:

The business of dealing in investment securities by the association shall be limited to purchasing and selling such securities without recourse, solely upon the order, and for the account of, customers, and in no case for its own account, and the association shall not underwrite any issue of securities: * * * Except as hereinafter

provided or otherwise permitted by law, nothing herein contained shall authorize the purchase by the association of any shares of stock of any corporation.

That statute became effective one year after its enactment on June 16, 1933, and therefore it was in effect at the time the transactions herein took place, allegedly acquiring the Sunshine stock for the benefit of the Bank in 1934. (R. 484-485.) The taxpayer itself admits it would have been improper for the Bank to own and hold the stock in question. (Br. 36.)

The court below erroneously stated that this law contains no positive prohibition against the purchase of corporate stock by a national bank but that such banks' contract to purchase is merely *ultra vires* and voidable, not illegal and void. It concluded, therefore, that the Trust Company's contention—that the Bank could not lose because if the price of the Sunshine stock fluctuated upward or downward, the Bank could enforce the deal or refuse to perform, respectively—must be accepted as correct even though what the parties did herein directly contravened public policy. (R. 471.) Such contention on the part of the Trust Company, however, necessarily recognizes the invalidity of the contract for the reason that, whether or not *ultra vires* or illegal, neither the Bank's credit nor its property could have been subjected to the hazards of any contingent liability resulting from the transactions in question in view of the Trust Company's position that the Bank "could

not lose" but could refuse to perform the contract, if any existed. (R. 471.)

In this situation, it is difficult to conceive of a valid arm's-length tripartite contract existing between the Holding Company, Miller and the Bank, as claimed by the taxpayer, in order to accomplish the desired result—diversion of the profits to the Bank—as the facts indicate. This seems particularly true inasmuch as the Holding Company owned all the stock of and controlled the Bank, and all the moving parties in interest involved in the transactions were identical individuals and officers (including Miller, one of the contracting parties) comprising the board of trustees of both corporations. (R. 483.) Moreover, Miller's performance of the contract *in part* (depositing his 5,000 shares with the Trust Company in escrow), and the Holding Company's definite liability to perform on its part (obligation to deliver its 4,000 shares), as the facts show (R. 312-314), would seem necessarily to invoke the rule prohibiting avoidance of a voidable contract after one of the parties has performed in part and one of them becomes strictly liable to perform on his part. Since the contract herein in respect to the Bank's alleged beneficial purchase and ownership of the Sunshine stock was expressly prohibited by federal statute providing that it could purchase and sell corporate securities "without recourse" for customers only, and therefore afforded no remedy against it in such transactions, the contract was invalid in so far as the Bank was concerned. *Awotin v.*

Atlas Exchange Bank, 295 U. S. 209; cf. also *First Nat. Bank v. Exchange Bank*, 92 U. S. 122; *California Bank v. Kennedy*, 167 U. S. 362, 367, 369; *Concord First National Bank v. Hawkins*, 174 U. S. 364 (all holding substantially that, under similar prohibitory statutes prior to the amendment of Section 5136, Revised Statutes, by the Act of June 16, 1933, while such contracts were not expressly prohibited, nevertheless such prohibition is implied by the failure to grant the power).

Since the facts herein show that the board of trustees of both the Holding Company and the Bank comprised the same individuals, no sound reason appears as to why the transactions in question were handled in the manner in which the Trust Company contends they were handled, unless they admit that the stock was purchased and held by the Holding Company for the benefit of the Bank in order to avoid the inhibitions of Section 5136, Revised Statutes, as amended. Such a position would be tantamount to an admission that circumvention of the banking laws was planned by the board of trustees of the Holding Company and the Bank on one hand, and the vehement denial on the other that the income comprising the proceeds from the sale of the two blocks of Sunshine stock was intentionally diverted and shifted to the Bank in order to avoid taxation.

Accordingly, we disagree with the District Court's above-mentioned views and conclusion that the taxpayer's position in this respect must be accepted as

correct even though against public policy. (R. 471.) Our reason therefor is that under the statute, the Bank had the capacity to take legal title to "investment securities * * * in no case for its own account" and "nothing herein contained shall authorize the purchase by the [banking] association of any shares of stock of any corporation." Therefore, it must necessarily follow that the Bank had no capacity, in turn, to become the beneficiary of a trust of such property (Restatement of the Law of Trusts, Section 117, Appendix, *infra*; cf. *Coleman v. S. R. T. R. Co.*, 49 Cal. 517, 522).

In this view, the trust which the District Court found to exist in favor of the Bank (R. 492) was necessarily invalid. Consequently, there is no support for the decision of the court below that the Bank was the actual equitable and beneficial owner and holder of the 5,000 shares of Sunshine stock. (R. 473-475, 492.) Neither is there any support for the Trust Company's contention to the same effect, therefore, in respect to the 7,500 shares of Sunshine stock (Br. 31-37, 63-68). The many cases relied upon by the Trust Company (Br. 47-49) merely support the view that a trust may be created informally. They do not deal with the question of incompetent parties. Hence they are not in point and have no application to the facts herein.

It follows, we submit, that the Holding Company was chargeable with, and should properly report a taxable income under Section 22 (a) of the Revenue Act of 1934 (Appendix, *infra*), the entire proceeds

realized from the sale of the 3,500 as well as the 7,500 shares of Sunshine stock in 1935.

IV.

ANY INTEREST OF THE BANK WAS CONFINED TO THE PROCEEDS OF THE SALE OF THE STOCK

The letter of December 12, 1934 (R. 315), which is relied on as creating the trust, dealt with the proceeds of the sale of the 7,500 shares and any claim of the Bank would have been satisfied by diverting the proceeds to it. The letter provides for reimbursement of the Holding Company out of the proceeds of the sale, and it is clear that until that obligation was satisfied the Bank had no control over the stock. The reference to a possible loss being borne by the Bank and its having the benefit of any profit is a clear indication that the Bank's interest was contingent upon the result of the sale. It does not require the conclusion that before the sale the stock was held in trust.

If the Bank's interest was only in the proceeds of the sale, it is evident that the Holding Company was merely agreeing in advance to share with the Bank any profit from the sale. The Holding Company was to have for itself "a small appreciation" over the cost of the stock.

Such an agreement is an assignment of income and "the tax could not be escaped by anticipatory arrangements and contracts however skillfully devised

* * * by which the fruits are attributed to a different tree from that on which they grew." *Lucas v. Earl*, 281 U. S. 111, 115.

In so far as the letter refers to the 4,000 shares acquired from Mr. Miller there is no language indicating a trust. The reference is merely to a sale to the Bank at a stipulated price.

The Holding Company had a purpose of its own to be served by the speculation in the Sunshine stock. The facts plainly indicate that the Holding Company was obliged to raise large amounts of funds to liquidate its liability of \$78,000 owing to the First Security and Loan Company. (R. 310.) It was further required to raise additional funds to bolster up the precarious financial condition of its wholly-owned subsidiary, the Bank, as required by the National Banking Department. (R. 446, 483.) It was the plan partially to effect such result by purchasing, with the balance of the funds to be received from the sale of both blocks of Sunshine stock, various notes held by the Bank. (R. 311-312.) Its exchange of 4,000 of its own shares for Miller's 5,000 Sunshine shares was designed primarily to make available to the Holding Company at least \$200,000 of "new money" to accomplish the desired purposes. (R. 314.) Another of the several purposes was "to consummate certain plans of reorganization that had been under consideration by the officers of the company" (R. 309) which "would be in keeping with the completion of the plans of reorganization that had been under consideration" in respect to the Bank (R.

311). These plans of reorganization are disclosed by the District Court's finding that "during the time herein involved the Bank had not recovered from the losses sustained during the depression of the preceding years, and by reason thereof the capital of the Bank was impaired, and as a result thereof there was insistence by the National Banking Department that the Bank strengthen its financial position." (R. 483.)

From the foregoing it is apparent that effect was given to all of the Holding Company's purposes through the acquisition and sale of the two lots of Sunshine Mining Stock. This resulted in the Holding Company's realization, upon the sale of both blocks of stock in April, 1935, of proceeds in the sum of \$199,225.45 (R. 491), only slightly short of the \$200,000 initially desired (R. 314).

The court below found that the Bank suffered impairment of its capital through losses during the depression of preceding years, and that the National Banking Department required that its financial position be strengthened. (R. 483.) This was in effect accomplished by the Holding Company's consummating the plans of reorganization to supply the requisite additional funds for the Bank to the extent of \$200,000 (R. 308-312, 314), and that diversion of the proceeds from the sale of the two blocks of Sunshine stock for almost that amount (R. 491) gave substantial effect to the plans. This was accomplished by the Holding Company's delivering, or having delivered in part, 12,500 shares of its Sunshine stock

to the Bank in April, 1935, which sold 11,000 shares thereof through the brokerage concern.

Whatever proceeds from the sale the Holding Company diverted or permitted to be diverted to the subsidiary Bank, therefore, constituted at best a capital contribution or paid-in surplus—but not income—to the Bank, its wholly-owned subsidiary, but no less income to the Holding Company. Article 22 (a) 17, Treasury Regulations 86 (Appendix, *infra*). That regulation provides that such contributions are in the nature of voluntary assessments upon and represent an additional price paid for stock held by the stockholder, but do not constitute income to the recipient corporation. Hence, the amount of the proceeds diverted to the Bank upon the sale of the stock in 1935 constituted merely additional cost of the Holding Company's 4,837½ shares of the Bank's stock held by it as "investments." (R. 305.) Although the regulation refers only to "voluntary pro rata payments by * * * shareholders," contributions other than those in proportion to stockholdings nevertheless come within the rule. G. C. M. 4015, VII-1 Cum. Bull. 120 (1928). Cf. *In re Park's Estate*, 58 F. 2d 965 (C. C. A. 2d), where the court stated (p. 966):

So where a stockholder sees fit to contribute additional funds to the capital account of the bank when his stock cannot be assessed, he has merely added to the cost of his stock.

Cf. also *First Nat. Bank in Wichita v. Commissioner*, 46 F. 2d 283 (C. C. A. 10th).

Quite clearly, therefore, the transactions effect-

ing the acquisition and sale of the 11,000 shares of Sunshine stock at large profits, which were diverted to the Bank, amounted to no more than a capital contribution by the Holding Company, its sole stockholder. This harmonizes with the plans outlined in the minutes of its executive committee's meeting held April 12, 1935 (R. 308-312), and as shown in Miller's letter of December 11, 1934, to the Trust Company (R. 314), and the capital contribution was in fact credited to the Bank's surplus account (R. 320, 456, 468), in accordance with the provisions of Article 22 (a)-17 of Regulations 86.

We have already shown that, under the agreement, the 7,500 shares of Sunshine stock were purchased by the Holding Company and delivered to the Bank for sale through the brokerage concern, but that the Holding Company at all times had control of and received the dividends or earnings paid on the stock and so reported them in its 1935 tax return; also that Miller, from whom the Holding Company acquired the 5,000 shares allegedly for the benefit of the Bank, likewise received the dividends on those shares which he had deposited in escrow with the Trust Company. These facts are incompatible with the actual ownership of the 11,000 shares in anyone other than the Holding Company; just as much so as is the taxpayer's incongruous contention that the Holding Company bought and held the stock for the account and benefit of the Bank, even though the latter was not legally competent to buy, own and/or sell the stock for its own

account and the Holding Company continued to receive and report, as income, the dividends paid thereon, as heretofore shown.

It is apparent from the facts herein that the 11,000 shares of stock were at all times under the control and subject to the unfettered command of the Holding Company since acquisition. Its diversion of the proceeds from the sale of the stock to the Bank did not change the result. It is settled that "the income that is subject to a man's unfettered command and that he is free to enjoy at his own option may be taxed to him as his income, whether he sees fit to enjoy it or not." *Corliss v. Bowers*, 281 U. S. 376, 378. Moreover, the power to dispose of income is the equivalent of ownership of it, and the exercise of such power to procure the payment of income to another is the enjoyment and therefore the realization of the income by him who exercises it. *Helvering v. Horst*, 311 U. S. 112; cf. *Lucas v. Earl*, *supra*.

In view of the foregoing, we submit that the entire profit realized from the sale in 1935 of the 11,000 shares of Sunshine mining stock in question was, under the provisions of Section 22 (a) of the Revenue Act of 1934, properly chargeable and taxable income to the Yakima Holding Corporation in that year.

CONCLUSION

The District Court's judgment in respect to the taxability of the proceeds realized from the sale of the 7,500 shares of Sunshine Mining Company stock is correct and in accordance with law and the authorities. The judgment to that extent should therefore be affirmed.

The District Court's judgment in respect to the taxability of the proceeds realized on the sale of the 3,500 shares of Sunshine Mining Company stock is erroneous and not in accordance with law and controlling authority. The judgment to that extent should therefore be reversed and judgment entered in favor of the United States forthwith.

Respectfully submitted,

SAMUEL O. CLARK, JR.,

Assistant Attorney General.

SEWALL KEY,

J. LOUIS MONARCH

S. DEE HANSON,

*Special Assistants to the
Attorney General.*

EDWARD M. CONNELLY,

United States Attorney.

HARVEY ERICKSON,

Assistant United States Attorney.

THOMAS R. WINTER,

*Special Assistant to the Chief Counsel,
Bureau of Internal Revenue.*

JUNE, 1943

APPENDIX

Revenue Act of 1934, c. 277, 48 Stat. 680:

SEC. 22. GROSS INCOME.

(a) *General Definition*.—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

* * * *

Revised Statutes:

SEC. 5136 [as amended by Act of June 16, 1933, c. 89, 48 Stat. 162]. Upon duly making and filing articles of association and an organization certificate, the association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power—

* * * *

Seventh. * * * The business of dealing in investment securities by the association shall be limited to purchasing and selling such securities without recourse, solely upon the order, and for the account of, customers, and in no case for its own account, and the association shall not underwrite any issue of securities: * * * As used in this section the term 'investment securities' shall mean marketable obligations evidencing indebtedness of any person, copartnership, associa-

tion, or corporation in the form of bonds, notes and/or debentures commonly known as investment securities under such further definition of the term 'investment securities' as may by regulation be prescribed by the Comptroller of the Currency. Except as hereinafter provided or otherwise permitted by law, nothing herein contained shall authorize the purchase by the association of any shares of stock of any corporation

* * * *

(U. S. C. 1940 ed., Title 12, Sec. 24.)

Treasury Regulations 86, promulgated under the

Revenue Act of 1934:

ART. 22(a)-17. *Contributions to corporation by shareholders.*—If a corporation requires additional funds for conducting its business and obtains such needed money through voluntary pro rata payments by its shareholders, the amounts so received being credited to its surplus account or to a special capital account, such amounts will not be considered income, although there is no increase in the outstanding shares of stock of the corporation. The payments under such circumstances are in the nature of voluntary assessments upon, and represent an additional price paid for, the shares of stock held by the individual shareholders, and will be treated as an addition to and as a part of the operating capital of the company. (See articles 22 (a)-14 and 24-2).

Restatement of the Law of Trusts:

SEC. 117. LACK OF CAPACITY TO BE BENEFICIARY.

Except as stated in Sections 118 and 119 [re capacity of married women for their separate use, and unincorporated associations, to be bene-

ficiaries of a trust, respectively] *a person who has no capacity to take the legal title to property has no capacity to become the beneficiary of a trust of such property, and a person has capacity to continue to be beneficiary of a trust of property only to the extent that he has capacity to hold the legal title to such property.*

Comment:

a. Corporations. If a corporation cannot take title to land or to land of more than a certain value or except for certain purposes, it cannot become the beneficiary of a trust of land or of land of more than the designated value or for other than the designated purposes. If a corporation can take but cannot hold the title to land against the objection of the State, it cannot continue to hold the beneficial interest against the objection of the State.

* * * *

IN THE

United States Circuit Court

of Appeals

FOR THE NINTH CIRCUIT

GUARANTY TRUST COMPANY, a corporation, as
liquidating trustee of Yakima Holding Cor-
poration,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

and

UNITED STATES OF AMERICA,

Appellant,

vs.

GUARANTY TRUST COMPANY, a corporation, as
liquidating trustee of Yakima Holding Cor-
poration,

Appellee.

REPLY BRIEF OF APPELLANT,
GUARANTY TRUST COMPANY

UPON APPEALS FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE EASTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

CHENEY & HUTCHESON
JOSEPH C. CHENEY
ELWOOD HUTCHESON

Attorneys for Guaranty Trust Company
426 Miller Building
Yakima, Washington

FILED

JUL 19 1943

PAUL P. O'BRIEN,
CLERK

1875

1875

1875

1875

1875

1875

1875

1875

1875

1875

1875

1875

1875

1875

ARGUMENT

The position taken by the government in its brief is this: That because the Holding Company participated in a transaction that was ultra vires the Bank's powers, the Holding Company must pay an income tax upon the profits the Bank made, kept and spent.

This is almost the same as contending that each of the officers of the Bank and the Holding Company should have to pay an income tax upon the same profit because they participated in the ultra vires acts which led to the Bank making the profit.

Neither the Holding Company nor the officers were entitled to receive any of the money: neither of them received any of the money.

The entire argument comes to this: The Bank made the profit, but it should not have done so. Therefore we are going to punish the Holding Company for participating in the transaction by arbitrarily assuming that the profit was received by it, even though it is admitted that it neither received nor was entitled to receive, any of the profit.

This remarkable conclusion is solely based upon the contention that because the statute (12 U.S.C.A. 24 (7) contains the following sentence:

"Except as hereinafter provided or otherwise permitted by law, nothing herein contained shall authorize the *purchase* by the association of any shares of stock of any corporation." (Italics supplied)

From this lack of power to “purchase” stock, counsel blandly deduce a positive legal prohibition of the “ownership” of any stock.

After making this hurdle, they contend that the Bank could not be the beneficiary of a trust which involved corporate stock. The sole authority to sustain this position being Section 117 of the Restatement of the Law of Trusts and an early California case.

The conclusive answers to this contention are:

(1) The Holding Company bought the stock for the Bank and as the agent of the Bank, and never had any title to the stock whatsoever. The stock never was in its name, nor except in passing within its possession or under its control. The Miller stock was delivered to the Guaranty Trust Company for the Bank and by the Trust Company was delivered to the Bank. The 7500 shares were bought, 5000 shares in the Bank’s name and 2500 shares in the name of Bradshaw and were delivered to the Bank, which kept it, and which sold it, received the proceeds and used the proceeds. It was exactly the same as if the stock had been bought for the Bank, and with its money by and in the name of one of the Bank’s officers. Regardless of the doctrine of ultra vires, the stock was the property of the Bank. And title vested in the Bank.

36 *Yale L. J.* 297, 304;

7 *Fletcher Corp.* (Perm. Ed.) 654-5;

McCandless v. Hoskins, 20 F. (2) 688, 692; Aff. 28 F.

(2) 693, 8 Cir.

Schofield v. Baker, 212 F. 504; 221 F. 322.

No one can question the transaction after it was executed, (and here the facts are, and the trial court found, that the transaction was fully executed,) except the sovereign which created the corporation, and then only in direct proceedings in quo warranto or for ouster and forfeiture of the Bank's charter.

7 *Fletcher Corp.* (Perm. ed.) 651, 669;

7 *Fletcher Corp.* (Perm. ed.) 658-60;

Kerfoot v. Farmers & Merchants Bank, 218 U.S. 281;

Even where a statute directly forbids the acquisition of the property, the title vests subject only to proceedings in the nature of quo warranto.

7 *Fletcher Corp.* (Perm. ed.) 666-8;

7 *Fletcher Corp.* (Perm. ed.) 669.

The statute does not impliedly nor expressly forbid a National Bank from "owning" corporate stock—it is only not granted the powers to "purchase" corporate stock. It is perfectly proper for it to loan money and take corporate stock as collateral security and, upon forfeiture, to become the owner to save itself from loss, it may receive such stock as a gift or bequest.

It is, however, an ultra vires act for it to buy the stock, but after it has bought the stock, it owns the stock and may receive the dividends upon it, vote it and sell it.

Section 117 of the Restatement of Trusts refers only

to those cases where there is an absolute lack of capacity to *own*, regardless of the method of acquiring title.

The comment quoted on page 37 of the answer brief in the first place is in reference to land only, and in the second place clearly recognizes the doctrine of ultra vires, set forth above, that the trust is good until directly attacked by the sovereign in quo warranto proceedings.

The Supreme Court said in *Kerfoot v. Farmers N Merchants Bank*, 218 U.S. 281, 286, that an ultra vires purchase of real estate vested title in the National Bank, and that the Bank's buying the property,—

“only lays the bank open to proceedings by the government for exercising powers not conferred by law.”

In *Union Nat. Bank v. Matthews*, 98 U.S. 621, the court held in reference to an ultra vires purchase of property:

“It is valid until assailed in a direct proceedings instituted for that purpose.”

Thompson v. St. Nicholas National Bank, 146 U. S. 240, 247, 252;

Logan Co. Nat. Bank v. Townsend, 139 U.S. 67, 77;

National Bank of Genesee v. Whitney, 103 U.S. 99.

In *Cleveland C. C. & St. L. R. Co. v. U. S.* 275 U.S. 404, 414, the court citing the *Kerfoot* case, *supra*, said:

“If the state concludes to question the legality of the shippers' acts, it must do so in a direct proceedings instituted by it for that purpose.”

Against these authorities the government refers to an inadvertent statement on page 36 of our opening brief

where the word "own" was used, when it should have been "buy" or "purchase", and the whole tenor of the brief so shows, and several cases (page 26 of answer brief) all of which are in reference to cases where a National Bank had been sued upon an ultra vires contract in an attempt to enforce the ultra vires contract against the bank. Those cases simply hold that the bank can defend against an unexecuted ultra vires contract.

The case of *Awotin v. Atlas Exch. Nat. Bank*, 295 U.S. 209, is explained and distinguished from a case such as this in *Oppenheimer v. Harriman Nat. Bank*, 301 U. S. 206, 211, as follows:

"But that decision does not support its contention. There the bank sold bonds and in connection with the sale agreed with the buyer that at maturity it would repurchase at par value and accrued interest. We held the agreement repugnant to § 24 (Seventh) requiring sales to be without recourse. The sale was a valid executed contract; the bank's *promise* to repurchase was forbidden by law and therefore void. The purchaser, chargeable with knowledge of the statute, could not invoke estoppel."

The 8th Circuit in *Jackman v. Continental Nat. Bank*, 16 F. (2d) 728, reviews the other cases cited and shows their inapplicability.

In the *Oppenheimer* case the court, citing *Lantry v. Wallace*, 182 U.S. 536 (quoted on page 59 of our opening brief) and most of the cases cited by us above, said:

"The bank had power to sell the stock in question whether acquired by it in accordance with or contrary

to § 83, and whether the stock belonged to it, the affiliate or a third party."

Here as we stated above, the government is seeking to impose a penalty or punishment upon the Holding Company for participating in a transaction which was ultra vires as to the Bank. This we believe cannot be done.

In *Union National Bank v. Matthews*, 98 U.S. 621, 629, quoted with approval in *Scott v. DeWeese*, 181 U.S. 202, 211, the Supreme Court said in reference to the limit of possible punishment for an ultra vires transaction:

"The impending danger of a judgment of ouster and dissolution was, we think, the check, and none other, contemplated by Congress. That has been always the punishment prescribed for the wanton violation of a charter, and it may be made to follow whenever the proper public authority shall see fit to invoke its application."

Also quoted and cited with approval:

American Surety Co. v. Moran, Dist. Ct. of App., 75 F. (2) 646, 647;
Schneider v. Thompson, 8 Cir. 58 F. (2d) 94, 99.

Another answer to the government's position is the *Baker v. Scofield* litigation which arose in this circuit.

Scofield v. Baker, D.C. 212 Fed. 504;
Baker v. Scofield, 9th Cir. 221 Fed. 322;
Baker v. Scofield, 243 U.S. 114.

In that litigation a trust was imposed upon real estate in favor of a national bank. That is, the bank was the beneficiary.

This court said (221 Fed. at 326):

“It may be conceded that the contract was ultra vires. But its invalidity by reason of the fact that it was ultra vires cannot be interposed by the defendants as a defense to a suit of this character.”

The court then cites the quotes from *Union National Bank v. Matthews*, 98 U.S. 621, including the quotations above, and other cases. The Supreme Court affirmed.

Those cases constitute conclusive authority for the proposition that, if the Holding Company had secured possession of the Sunshine stock, the Bank could have a resulting trust established and recovered the stock, and if it had been sold, all of the proceeds of the stock.

Here it was found by the court and established by the uncontradicted evidence, that the Holding Company was the agent of the Bank to buy the Sunshine stock.

If the Holding Company had taken title of the stock in its name, it would have been liable as, and subject to all the duties of a trustee.

2 Restatement, Agency, § 423.

But here the Holding Company did not take title in its own name; it never had a single share in its name.

5000 shares were bought in the name of the Bank. It is the uncontradicted evidence that the bank was the owner of the stock. After it was bought in the Bank's name the stock was delivered to the Bank; later the Bank sold the

stock and received all the proceeds and used part of those proceeds to pay its debt to the Holding Company. Upon what theory the trial court construed that purchase to be one by the Holding Company in its own behalf we are unable to speculate.

2500 shares were bought in the name of George Bradshaw, who was an officer of the Bank and of the Holding Company. He signed and delivered the letter (Ex. 191, Tr. 47, 315) stating that that stock was bought for the Bank. He endorsed the certificate, delivered the certificate to the Bank, later the Bank sells the stock, receives the proceeds, uses the proceeds, using part to pay its indebtedness to the Holding Company. Upon what fact the trial court based its conclusion that this purchase was by and for the Holding Company does not appear.

All we know is that he concluded that the above transactions were for the account of the Holding Company, and this in face of his express holding that the agreement (Ex. 19) "was executed and delivered on December 12, 1934, *and was performed.*" (Finding 12, Tr. 490)

The 5000 shares of Miller stock was delivered by Miller to the Guaranty Trust Company, which in turn delivered the shares to the Bank; the Bank sold 3500 of the shares; paid Miller for the shares out of the proceeds (Tr. 491) and kept and used all of the balance. The 1500 shares of stock were retained by the Bank until later, when it sold those shares and kept and retained all of the proceeds.

That the government's position based upon § 117 of the Restatement is wholly fallacious is clearly shown by the leading authorities on the law of trusts.

In 1 *Bogert, Trusts N Trustees*, § 168 p. 492-493 the author says.

"If the acceptance of the beneficial interest by the cestui corporation would be merely ultra vires, the disposition of the courts is to treat the trust for the corporation as valid and enforceable by the cestui against the trustee, but subject to attack by the state or the stockholders."

See also 1 *Scott on Trusts*, § 117.1 p. 590.

Further, no one, not even counsel in this case, has ever contended that bank could not perform an ultra vires act, and no one has ever contended that its agents could not assist it in the performance of an ultra vires act.

All that the Holding Company ever did was to act as the Bank's agent in buying the stock for it.

7 *Fletcher Corporations* (Perm. Ed.) § 580.
Lucas v. Earl doctrine.

On pages 28 to 33 the government interjects the doctrine of the cases of *Lucas v. Earl*, 281 U.S. 11 and *Helvering v. Horst*, 311 U.S. 112. These cases hold, and only hold, that, where "A" who wholly owns, controls and possesses an asset—personal services in the *Lucas* case and bonds in the *Horst* case—assigns or transfers all or a part of the income from that asset, while still retaining full ownership, control

and possession of the asset, to "B", the income from the asset is to be taxed to "A", the owner of the asset.

In Blair v. Commissioner, 300 U.S. 5, the Supreme Court held:

"The one who is to receive the income as the owner of the beneficial interest is to pay the tax."

The evidence upon this question is clear and unimpeached and uncontradicted.

The Bank in August 1934 bought 7500 shares of Sunshine stock. (R 93, 101, 108, 114, 119, 128, 156, 170, 171, 172).

The 5000 share purchase which was made in the name of the Bank was handled by R. M. Hardy. (R 93-4, 135)

The Bank directed Mr. Bradshaw to buy the 2500 shares which were taken in his name. (R 95)

All of the 7500 shares of stock was kept in Mr. Hardy's possession for the Bank. (R 96)

In the letter and written agreement of December 12, 1934, (R 484) it is clearly stated that the 7500 shares and the 5000 shares of Sunshine were purchased for and held for the Bank. That the stock belonged to the Bank. And the court held that the agreements referred to in the letter were "performed." (R 490)

Under the record there can be no question but that the stock and the proceeds of the sale of the stock cannot be taxed to the Holding Company. It had no interest therein.

Comm. v. O'Donnell, 9 Cir. 90 F. (2) 907
U. S. v. Spalding, 9 Cir. 97 F. (2) 701, 704.

We respectfully submit that the decree of the lower court should be affirmed upon the appeal of the government and reversed with instructions to enter judgment for the Guaranty Trust Company, upon its appeal in the full amount sued for, \$26,933.86 with 6% interest from May 27, 1938.

Respectfully submitted,

CHENEY & HUTCHESON
JOSEPH C. CHENEY
ELWOOD HUTCHESON

Attorneys for
Guaranty Trust Company

No. 10395

United States
Circuit Court of Appeals

For the Ninth Circuit. 6

PACIFIC AMERICAN FISHERIES, INC., a
corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

And

ALASKA PACIFIC SALMON COMPANY, a
corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeals from the District Court of the United States
for the Western District of Washington
Northern Division

FILED
MAY - 6 1943

No. 10395

United States
Circuit Court of Appeals

For the Ninth Circuit.

PACIFIC AMERICAN FISHERIES, INC., a
corporation,

/ Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

And

ALASKA PACIFIC SALMON COMPANY, a
corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeals from the District Court of the United States
for the Western District of Washington
Northern Division



INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Answer, Cause 396.....	10
Answer, Cause 397.....	31
Appeal:	
Certificate of Clerk to Transcript of Record on	47
Cost Bond on (Cause 396).....	21
Cost Bond on (Cause 397).....	44
Notice of (Cause 396).....	21
Notice of (Cause 397).....	44
Order Extending Time to Docket (Cause 396)	23
Order Extending Time to Docket (Cause 397)	46
Statement of Points and Designation of Record, Appellants (CCA).....	196
Stipulation for Record on (DC).....	47
Certificate of Clerk to Transcript of Record on Appeal	49

Index	Page
Complaint, Cause 396.....	2
Complaint, Cause 397.....	24
Cost Bond on Appeal, Cause 396.....	21
Cost Bond on Appeal, Cause 397.....	44
Designation of Record on Appeal, Appellants (CCA)	196
Findings of Fact and Conclusions of Law, Cause 396	12
Findings of Fact and Conclusions of Law, Cause 397	34
Judgment, Cause 396.....	19
Judgment, Cause 397.....	42
Names and Addresses of Counsel of Record...	1
Notice of Appeal, Cause 396.....	21
Notice of Appeal, Cause 397.....	44
Order Extending Time to Docket Appeal, Cause 396	23
Order Extending Time to Docket Appeal, Cause 397	46
Statement of Points and Designation of Rec- ord on Appeal, Appellants (CCA).....	196
Stipulation for Record on Appeal (Causes 396, 397)	47

Index

Page

Transcript of Proceedings, Causes 396, 397... 51

Stipulation of Counsel re Labor Contracts

Offered and Admitted as Exhibits..... 182

Witnesses for Defendant:

Buschmann, August

—direct 133

—recalled, direct 159

—cross 163

—redirect 167

Espe, Conrad

—direct 176

Hecker, William

—direct 170

Witnesses for Plaintiffs:

Mowry, Russell

—direct 55

—recalled, direct 100

—cross 100

Tegtmeyer, Fred W.

—direct 80, 90

—cross 91



COUNSEL OF RECORD

MESSRS. KERR, McCORD AND CAREY
STEPHEN V. CAREY
J. L. COLLINS

1309 Hoge Building, Seattle, Washington

Attorneys for Plaintiffs-Appellants.

J. CHARLES DENNIS, ESQ.

United States Attorney,

GERALD SHUCKLIN, ESQ.

Assistant United States Attorney,

United States Courthouse, Seattle, Wash-
ington

THOMAS R. WINTER, ESQ.

Special Assistant to Chief Counsel, Bureau of
Internal Revenue,

Federal Office Building, Seattle, Wash-
ington.

Attorneys for Defendant-Appellee.

In the District Court of the United States for the
Western District of Washington, Northern Division

No. 396

PACIFIC AMERICAN FISHERIES, INC.,
a corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT FOR RECOVERY OF EXCESS
SOCIAL SECURITY TAXES

The plaintiff as its First Cause of Action against the defendant alleges:

I.

That at all times hereinafter mentioned plaintiff was and it now is a corporation organized and existing under the laws of the State of Delaware and duly qualified and authorized to do business in the State of Washington and in the Territory of Alaska; that plaintiff is a citizen of the United States and at all times it has borne true allegiance to the government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said United States; that plaintiff is justly entitled to the amount herein claimed from the United States and that no assignment or transfer of said claim or any part thereof or any interest therein has been made; that plain-

tiff's principal office and place of business has been and is now at Bellingham in the Northern Division of the Western District of Washington.

II.

In the years 1937, 1938, and 1939 plaintiff was engaged in the business of catching and packing salmon. In conducting such business during the operating seasons of said years, it [1*] operated a number of canneries with necessary traps and floating equipment situated in remote or isolated locations in Southeastern Alaska, on Kodiak Island, along the Alaska Peninsula, and on Bristol Bay. Said canneries were operated only during the fishing season, covering a period of only a few weeks in the Bristol Bay area and not exceeding several months in the other districts depending upon the run of fish in the several districts in which said canneries were located. During the remainder of said years said canneries were closed down and for all practical purposes deserted except for a watchman left in charge of each.

To operate said canneries efficiently or at all, it was necessary that the plaintiff in advance of the fishing and operating season transport practically all its help from Bellingham and Seattle, Washington, and from Portland, Oregon, to its several Alaska canneries and return them to the several ports of embarkation at the end of the fishing and operating season. During the fishing and operating

* Page numbering appearing at foot of page of original certified Transcript of Record.

season, it was necessary that the plaintiff as a part of its operations furnish such employees with lodging and sustenance at the canneries at which they were employed, for otherwise no facilities for lodging and sustenance would have been available to them and it would have been impossible for plaintiff to have operated such canneries at all.

III.

During the fishing and operating season of 1937 the plaintiff so transported to and employed in its said Alaska canneries numerous workmen on account of which employment it became obligated to pay taxes under Title VIII of the Social Security Act. On October 30, 1937, the plaintiff filed with the Collector of Internal Revenue at Tacoma, Washington, its return [2] covering its 1937 operations, which return showed \$748,725.11 paid in cash for wages and \$140,954.50 as the estimated value of lodging and sustenance furnished to its Alaska employees during that season. A tax computed upon the aggregate of said two amounts (\$889,679.61) was paid to the Collector of Internal Revenue at Tacoma, Washington by the plaintiff on October 30, 1937, in the sum of \$8,896.80, which payment included \$1,409.54, being 1% of said sum of \$140,954.50, the estimated value of such lodging and sustenance. Said sum of \$1,409.54 was paid in error in that the said estimated value of lodging and sustenance upon which that sum was computed and paid as a tax was not wages nor taxable as wages; that on April 2, 1938, the plaintiff duly filed its claim with the said Collector of Internal Revenue to whom said excess

taxes were paid for the refund of the same and said claim was rejected in its entirety by the Commissioner of Internal Revenue on July 11, 1939; that said sum of \$1,409.54 with 6% interest thereon from said date of payment is justly owing to the plaintiff.

Second Cause of Action

As a second cause of action the plaintiff repeats paragraphs I and II of the foregoing first cause of action, and in addition thereto alleges that on November 18, 1939, the plaintiff filed with the Collector of Internal Revenue at Tacoma, Washington a supplemental return covering certain additional Alaska employees not included in the return described in the foregoing first cause of action. Said supplemental return showed \$474,142.71 paid in cash for wages and \$26,905 as the estimated value of lodging and sustenance furnished the plaintiff's 1937 Alaska employees covered by said supplemental return. A tax computed upon the aggregate of said two amounts (\$501,047.71) [3] was paid to the Collector of Internal Revenue at Tacoma by the plaintiff on November 18, 1939, in the sum of \$5,010.48, which payment included \$269.05, being 1% of said sum of \$26,905, the estimated value of such lodging and sustenance. Said sum of \$269.05 was paid in error in that the said estimated value of lodging and sustenance upon which said sum was computed and paid as a tax was not wages nor taxable as wages; that on November 8, 1940, the plaintiff duly filed its claim with the said Collector of Internal Revenue to whom said excess taxes were paid for the refund of the same, and said claim was re-

jected in its entirety by the Commissioner of Internal Revenue on December 20, 1940; that said sum of \$269.05 with 6% interest thereon from said date of payment is justly owing to the plaintiff.

Third Cause of Action

As a third cause of action the plaintiff repeats paragraphs I and II of the foregoing first cause of action, and in addition thereto alleges that during the fishing and operating season of 1938, the plaintiff so transported to and employed in its said Alaska canneries numerous workmen on account of which employment it became obligated to pay taxes under Title VIII of the Social Security Act. On October 29, 1938, the plaintiff filed with the Collector of Internal Revenue at Tacoma, Washington its return covering its 1938 operations, which return showed \$1,273,897.82 paid in cash for wages and \$141,756.92 as the estimated value of lodging and sustenance furnished to its Alaska employees during that season. A tax computed upon the aggregate of said two amounts (\$1,415,654.75) was paid to the Collector of Internal Revenue at Tacoma, Washington by the plaintiff on October 29, 1938, in the sum of \$14,156.55, which payment included \$1,417.57, being 1% of said sum of \$141,756.92, [4] the estimated value of such lodging and sustenance. Said sum of \$1417.57 was paid in error in that the said estimated value of lodging and sustenance upon which said sum was computed and paid as a tax was not wages nor taxable as wages; that on November 8, 1940, the plaintiff filed its claim with the said Collector of Internal Revenue to whom said

excess taxes were paid for the refund of the same, and said claim was rejected in its entirety by the Commissioner of Internal Revenue on December 20, 1940; that said sum of \$1417.57 with 6% interest thereon from said date of payment is justly owing to the plaintiff.

Fourth Cause of Action

As a fourth cause of action the plaintiff repeats paragraphs I and II of the foregoing first cause of action, and in addition thereto alleges that after the filing of the return and the payment of the taxes described in the foregoing third cause of action, the plaintiff on March 1, 1939, filed with the Collector of Internal Revenue at Tacoma, Washington a further return covering certain of its operations during the quarter ending December 31, 1938, which return showed \$79,513.31 paid in cash for wages and \$5,725.82 as the estimated value of lodging and sustenance furnished its Alaska employees covered by such return. A tax computed upon the aggregate of said two amounts (\$85,239.13) was paid to the Collector of Internal Revenue at Tacoma, Washington by the plaintiff on March 1, 1939, in the sum of \$852.39, which payment included \$57.26, being 1% of said sum of \$5,725.82, the estimated value of such lodging and sustenance. Said sum of \$57.26 was paid in error in that the said estimated value of lodging and sustenance upon which said sum was computed and paid as a tax was not wages nor taxable as wages; that on November 8, 1940, plaintiff duly filed its claim [5] with the said Collector of Internal Revenue to whom said excess taxes were

paid for refund of the same and said claim was rejected in its entirety by the Commissioner of Internal Revenue on December 20, 1940; that said sum of \$57.26 with 6% interest thereon from said date of payment is justly owing to the plaintiff.

Fifth Cause of Action

As a fifth cause of action the plaintiff repeats paragraphs I and II of the foregoing first cause of action, and in addition thereto alleges that during the fishing and operating season of 1939 the plaintiff so transported to and employed in its said Alaska canneries numerous workmen on account of which employment it became obligated to pay taxes under Title VIII of the Social Security Act, now known as "Federal Insurance Contributions Act." On November 18, 1939, the plaintiff filed with the Collector of Internal Revenue at Tacoma, Washington its return covering its 1939 operations, which return showed \$960,115.75 paid in cash for wages and \$129,086.18 as the estimated value of lodging and sustenance furnished to its Alaska employees during that season. A tax computed upon the aggregate of said two amounts (\$1,089,201.93) was paid to the Collector of Internal Revenue at Tacoma, Washington on November 18, 1939, in the sum of \$10,892.02, which payment included \$1,290.86, being 1% of said sum of \$129,086.18, the estimated value of such lodging and sustenance. Said sum of \$1,290.86 was paid in error in that said estimated value of lodging and sustenance upon which said sum was computed and paid as a tax was not wages nor taxable as wages; that on November 8, 1940, the plaintiff duly filed

its claim with the said Collector of Internal Revenue to whom said excess taxes were paid for the refund of the same and said claim was rejected in its entirety by the Commissioner of Internal [6] Revenue on December 20, 1940; that said sum of \$1,290.86 with 6% interest thereon from said date of payment is justly owing to the plaintiff.

Wherefore, plaintiff prays judgment against the defendant as follows:

On its first cause of action, in the sum of \$1,409.54, with interest thereon at the rate of 6% per annum from October 30, 1937, until paid.

On its second cause of action, in the sum of \$269.05, with interest thereon at the rate of 6% per annum from November 18, 1939, until paid.

On its third cause of action, in the sum of \$1417.57, with interest thereon at the rate of 6% per annum from October 29, 1938, until paid.

On its fourth cause of action, in the sum of \$57.26, with interest thereon at the rate of 6% per annum from March 1, 1939, until paid.

On its fifth cause of action, in the sum of \$1,290.86, with interest thereon at the rate of 6% per annum from November 18, 1939, until paid.

KERR, McCORD & CAREY
STEPHEN V. CAREY
J. L. COLLINS

Attorneys for plaintiff
1309 Hoge Bldg.
Seattle, Washington

[Endorsed]: Filed July 7, 1941. [7]

[Title of District Court and Cause.]

No. 396

ANSWER

Comes now the United States of America, defendant in the above entitled action, by and through J. Charles Dennis, United States Attorney for the Western District of Washington, and Gerald Shucklin, Assistant United States Attorney for said District, and for answer to the complaint of the plaintiff on file herein, alleges as follows:

First Cause of Action

I.

The allegations of Paragraph I of plaintiff's complaint are admitted, except that it is denied that the "plaintiff is justly entitled to the amount herein claimed from the United States."

II.

The defendant has no information sufficient to form a belief concerning the allegations contained in Paragraph II of plaintiff's complaint, and therefore denies the same.

III.

The allegations of Paragraph III of plaintiff's complaint are admitted, except that part thereof which states that "said sum of \$1,409.54 was paid in error in that the [8] said estimated value of lodging and sustenance upon which that sum was computed and paid as a tax was not wages nor taxable as

wages", which is denied. Defendant avers that the amounts paid for lodging and sustenance were included within the provisions of Section 811 (a) of Title VIII of the Social Security Act as wages. It is further denied by the defendant that there is anything "justly owing to the plaintiff".

In answer to the Second, Third, Fourth and Fifth Causes of Action of the Plaintiff's Complaint herein, defendant admits the allegations therein contained, except that it denies that the amounts expended for lodging and sustenance were not wages. Defendant avers that the amounts so expended were wages within the meaning of Section 811 (a) of Title VIII of the Social Security Act.

Wherefore, defendant prays that judgment be entered for the defendant and against the plaintiff, and that the defendant recover its costs and disbursements herein.

J. CHARLES DENNIS

United States Attorney.

GERALD SHUCKLIN

Assistant United States
Attorney.

Received a copy of the within Answer this 24 day
of Oct., 1941.

KERR, McCORD & CAREY

(J.L.C.)

Attorney for Plaintiff

[[Endorsed]: Filed Nov. 24, 1941. [9]

[Title of District Court and Cause.]

No. 396

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

The above-entitled cause and cause No. 397, Alaska Pacific Salmon Company, a corporation, Plaintiff, v. United States of America, Defendant, were consolidated for trial and came on regularly for trial before the above-entitled court, John C. Bowen presiding therein, sitting without a jury, plaintiff in each cause appearing by their attorneys, Kerr, McCord & Carey, being represented in court by Stephen V. Carey, and the defendant, United States of America, appearing by its attorneys, J. Charles Dennis, United States Attorney for the Western District of Washington, and Harry Sager, Assistant United States Attorney for said District, being represented in court by Thomas R. Winter, Special Assistant to the Chief Counsel for the Bureau of Internal Revenue, and witnesses for the plaintiffs and defendant having been sworn and having testified, exhibits having been introduced in court, written memoranda having been filed by counsel for both parties, oral argument had therein, and the court having on September 26, 1942, announced his oral decision, and the court being fully advised, now makes the following:

FINDINGS OF FACT

I.

That at all times hereinafter mentioned plaintiff was [10] and is now a corporation organized and

existing under the laws of the State of Delaware and duly qualified and authorized to do business in the State of Washington and in the Territory of Alaska; that plaintiff is a citizen of the United States and at all times it has borne true allegiance to the government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said United States; that plaintiff is the owner of the amount herein claimed from the United States and that no assignment or transfer of said claim or any part thereof or any interest therein has been made; that plaintiff's principal office and place of business has been and is now at Bellingham in the Northern Division of the Western District of Washington.

II.

In the years 1937, 1938, and 1939 plaintiff was engaged in the business of catching and packing salmon. In conducting such business during the operating seasons of said years, it operated a number of canneries with necessary traps and floating equipment situated in remote or isolated locations in Southeastern Alaska, on Kodiak Island, along the Alaska Peninsula, and on Bristol Bay. Said canneries were operated only during the fishing season, covering a period of only a few weeks in the Bristol Bay area and not exceeding several months in the other districts depending upon the run of fish in the several districts in which said canneries were located. During the remainder of said years said canneries were closed down and for all practical

purposes deserted except for a watchman left in charge of each.

To carry on said operations efficiently or at all, it was necessary that the plaintiff in advance of the fishing [11] and operating season transport most of its employees from Seattle, Washington or other places in the States to said places in Alaska and return them at the end of the fishing and operating season. During the fishing and operating season, it was necessary that the plaintiff, and it agreed that as part of its operations and in addition to cash was to furnish most of the employees with lodging and sustenance at their places of employment in Alaska, for otherwise no facilities for lodging and sustenance would have been available to them and it would have been impossible for the plaintiff to have carried on such operations at all, except that in cases where native Alaskan workers were employed and no lodging and sustenance furnished, additional cash wages were to be paid.

III.

During the fishing and operating season of 1937 the plaintiff so transported to and employed in its said Alaska canneries numerous workmen on account of which employment it became obligated to pay taxes under Title VIII of the Social Security Act. On October 30, 1937, the plaintiff filed with the Collector of Internal Revenue at Tacoma, Washington, its return covering its 1937 operations, which return showed \$748,725.11 paid in cash for wages and \$140,954.50 as the estimated value of lodging and sustenance furnished to its Alaska employees dur-

ing that season. A tax computed upon the aggregate of said two amounts (\$889,679.61) was paid to the Collector of Internal Revenue at Tacoma, Washington by the plaintiff on October 30, 1937, in the sum of \$8,896.80, which payment included \$1,409.54, being 1% of said sum of \$140,954.50, the estimated value of such lodging and sustenance. [12]

IV.

That on November 18, 1939, the plaintiff filed with the Collector of Internal Revenue at Tacoma, Washington, a supplemental return covering certain additional Alaska employees not included in the return described in the foregoing first cause of action. Said supplemental return showed \$474,142.71 paid in cash for wages and \$26,905.00 as the estimated value of lodging and sustenance furnished the plaintiff's 1937 Alaska employees covered by said supplemental return. A tax computed upon the aggregate of said two amounts (\$501,047.71) was paid to the Collector of Internal Revenue at Tacoma by the plaintiff on November 18, 1939, in the sum of \$5,010.48, which payment included \$269.05, being 1% of said sum of \$26,905.00, the estimated value of such lodging and sustenance.

V.

That during the fishing and operating season of 1938, the plaintiff so transported to and employed in its said Alaska canneries numerous workmen on account of which employment it became obligated to pay taxes under Title VIII of the Social Security Act. On October 29, 1938, the plaintiff filed with the Collector of Internal Revenue at Tacoma, Wash-

ington, its return covering its 1938 operations, which return showed \$1,273,897.82 paid in cash for wages and \$141,756.92 as the estimated value of lodging and sustenance furnished to its Alaska employees during that season. A tax computed upon the aggregate of said two amounts (\$1,415,654.75) was paid to the Collector of Internal Revenue at Tacoma, Washington, by the plaintiff on October 29, 1938, in the sum of \$14,156.55, which payment included \$1,417.57, being 1% of said sum of \$141,756.92, the estimated value of such lodging and sustenance. [13]

VI.

That after the filing of the return and the payment of the taxes described in the foregoing Paragraph V, the plaintiff on March 1, 1939, filed with the Collector of Internal Revenue at Tacoma, Washington, a further return covering certain of its operations during the quarter ending December 31, 1938, which return showed \$79,513.31 paid in cash for wages and \$5,725.82 as the estimated value of lodging and sustenance furnished its Alaska employees covered by such return. A tax computed upon the aggregate of said two amounts (\$85,239.13) was paid to the Collector of Internal Revenue at Tacoma, Washington, by the plaintiff on March 1, 1939, in the sum of \$852.39, which payment included \$57.26, being 1% of said sum of \$5,725.82, the estimated value of such lodging and sustenance.

VII.

That during the fishing and operating season of 1939 the plaintiff so transported to and employed

in its said Alaska canneries numerous workmen on account of which employment it became obligated to pay taxes under Title VIII of the Social Security Act, now known as "Federal Insurance Contributions Act." On November 18, 1939, the plaintiff filed with the Collector of Internal Revenue at Tacoma, Washington, its return covering its 1939 operations, which return showed \$960,115.75 paid in cash for wages and \$129,086.18 as the estimated value of lodging and sustenance furnished to its Alaska employees during that season. A tax computed upon the aggregate of said two amounts (\$1,089,201.93) was paid to the Collector of Internal Revenue at Tacoma, Washington, on November 18, 1939, in the sum of \$10,892.02, which payment included \$1,290.86, being 1% of said sum of \$129,086.18, the estimated value of such [14] lodging and sustenance.

VIII.

That within the time provided by law, namely, on April 2, 1938, and November 8, 1940, the plaintiff duly filed its claims for refund for the years 1937, 1938 and 1939 with the Collector of Internal Revenue to whom said taxes were paid for the refunds of the same and that said claims were rejected and disallowed in their entirety by the Commissioner of Internal Revenue on July 11, 1939, and December 20, 1940, and this action was timely filed on July 8, 1941.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Oct. 13, 1942. Judson W. Shorett, Clerk. By E. M. Rosser, Deputy.

From the foregoing Findings of Fact, the Court makes the following:

CONCLUSIONS OF LAW

I.

That the value of lodging and sustenance furnished plaintiff's admitted employees constituted "wages" within the meaning of Section 811 (a) of the Social Security Act and as amended (Title 26 U. S. C. A., Sec. 1426 (a), Internal Revenue Code).

II.

That the taxes assessed and collected, refunds of which are sought in this action, were in all respects legal and in strict accordance with the law.

III.

That the judgment should be entered dismissing plaintiff's complaint with prejudice and with costs to be taxed by the Clerk.

Dated this 13th day of October, 1942.

/s/ JOHN C. BOWEN

United States District Judge

Copy received this 5th day of Oct., 1942

KERR, McCORD & CAREY

by SJT

Presented by

THOMAS R. WINTER

of Plaintiff's Counsel

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern

Division, Oct. 5, 1942. Judson W. Shorett, Clerk.
By E. M. Rosser, Deputy.

In the District Court of the United States for the
Western District of Washington, Northern
Division

No. 396

PACIFIC AMERICAN FISHERIES, INC., a cor-
poration,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

The above-entitled cause and cause No. 397, Alaska Pacific Salmon Company, a corporation, Plaintiff, v. United States of America, Defendant, were consolidated for trial and came on regularly for trial before the above-entitled court, John C. Bowen presiding therein, sitting without a jury, plaintiff in each cause appearing by their attorneys, Kerr, McCord & Carey, being represented in court by Stephen V. Carey, and the defendant, United States of America, appearing by its attorneys, J. Charles Dennis, United States Attorney for the Western District of Washington, and Harry Sager, Assistant United States Attorney for said District, being represented in court by Thomas R. Winter, Special

Assistant to the Chief Counsel for the Bureau of Internal Revenue, and witnesses for the plaintiffs and defendant having been sworn and having testified, exhibits having been introduced in court, written memoranda having been filed by counsel for both parties, oral argument had therein and the court having on September 26, 1942, announced his oral decision, and the court having made and entered Findings of Fact and Conclusions of Law herein, now therefore, it is hereby [16]

Ordered, Adjudged and Decreed that the Plaintiff's complaint be and the same is hereby dismissed with prejudice and with costs to be taxed by the Clerk.

Dated this 13th day of October, 1942.

/s/ JOHN C. BOWEN

Judge

Presented by:

THOMAS R. WINTER

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Oct. 31, 1942. Judson W. Shorett, Clerk. By E. M. Rosser, Deputy.

[Endorsed]: Lodged in the United States District Court, Western District of Washington, Northern Division, Oct. 5, 1942. Judson W. Shorett, Clerk.

Copy received this 5 day of Oct. 1942

KERR, McCORD & CAREY

by SJT [17]

[Title of District Court and Cause.]

No. 396

NOTICE OF APPEAL

Notice is hereby given that Pacific American Fisheries, Inc., a corporation, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit, from the final judgment entered in this action on October 13, 1942.

KERR, McCORD & CAREY
STEPHEN V. CAREY

Attorneys for Pacific American Fisheries, Inc., a corporation,
1309 Hoge Building
Seattle, Washington

(Notice of Appeal & Bond filed Jan. 9, 1943.)

[Endorsed]: Filed Jan. 9, 1943. [18]

[Title of District Court and Cause.]

No. 396

COST BOND ON APPEAL

Know All Men by These Presents That we, Pacific American Fisheries, Inc., a corporation, as principal, and United States Fidelity and Guaranty Company, a corporation, as surety, acknowledge ourselves to be jointly indebted to United States of America, appellee in the above cause, in the sum of \$250.00 conditioned that:

Whereas, on the 13th day of October, 1942, in the District Court of the United States for the Western District of Washington, Northern Division in the above entitled and numbered cause, a judgment was entered in favor of the defendant dismissing the plaintiff's complaint with prejudice and with costs against plaintiff, and;

Whereas the plaintiff has filed in the office of the clerk of the said District Court a notice of appeal to United States Circuit Court of Appeals for the Ninth Circuit;

Now the condition of the above obligation is such that if the said Pacific Fisheries, Inc., a corporation, shall prosecute its appeal to effect and answer all costs if [19] the appeal is dismissed or the judgment affirmed, or such costs as the Appellate Court may award if the judgment is modified, then the above obligation is void else to remain in full force and effect.

PACIFIC AMERICAN FISH-
ERIES, INC., a corporation

By J. A. GREEN

Vice-President

Attest:

by PHILIP D. MACBRIDE

Chairman Executive Com-
mittee

UNITED STATES FIDELITY
AND GUARANTY COM-
PANY, a corporation

By JOHN C. M. McCALLISTER

Its Attorney in Fact.

[Endorsed]: Filed Jan. 9, 1943. [20]

[Title of District Court and Cause.]

No. 396

ORDER EXTENDING TIME TO
DOCKET APPEAL

It is ordered that the time within which to docket the record on appeal is hereby extended to and including April 1, 1943.

Done in open court this 9th day of February, 1943.

JOHN C. BOWEN

United States District Judge

Presented by:

S. V. CAREY

Attorney for Plaintiff

Approved:

THOMAS R. WINTER

Attorney for Defendant

[Endorsed]: Filed Feb. 9, 1943. [21]

In the District Court of the United States
For the Western District of Washington
Northern Division

No. 397

ALASKA PACIFIC SALMON COMPANY, a
corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT FOR RECOVERY OF EXCESS
SOCIAL SECURITY TAXES

The plaintiff as its First Cause of Action against the defendant alleges:

I.

That at all times hereinafter mentioned plaintiff was and it now is a corporation organized and existing under the laws of the State of Nevada and duly qualified and authorized to do business in the State of Washington and in the Territory of Alaska; that plaintiff is a citizen of the United States and at all times it has borne true allegiance to the government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said United States; that plaintiff is justly entitled to the amount herein claimed from the United States and that no assignment or transfer of said claim or any part thereof or any interest therein has been made; that plaintiff's

principal office and place of business has been and it is now at Seattle in the Northern Division of the Western District of Washington.

II.

That in the years 1937, 1938, and 1939 plaintiff was engaged in the business of catching and packing salmon in the [22] Territory of Alaska. In conducting such a business during the operating seasons of said years, it operated a number of canneries with necessary traps and floating equipment situated in remote or isolated locations in Alaska. In the year 1937, it operated a number of fish traps at Drier Bay on Prince William Sound, and canneries at Kake, Ketchikan, Port Althorp, and Rose Inlet in Southeastern Alaska, and a cannery at Sand Point in the Shumigan Islands. The said five canneries were operated during the succeeding seasons of 1938 and 1939. Said operations were carried on only during the fishing season, not exceeding several months in each year, depending upon the run of fish in the several fishing districts. During the remainder of said years, said operations were closed down, the canneries for all practical purposes being deserted except for a watchman left in charge of each.

To carry on said operations efficiently or at all, it was necessary that the plaintiff in advance of the fishing and operating season transport its employees from Seattle, Washington to said places in Alaska and return them to Seattle at the end of the fishing and operating season. During the fishing and op-

erating season, it was necessary that the plaintiff as part of its operations furnish such employes with lodging and sustenance at their places of employment in Alaska, for otherwise no facilities for lodging and sustenance would have been available to them and it would have been impossible for the plaintiff to have carried on such operations at all.

III.

During the fishing and operating season of 1937, the plaintiff so transported to and employed in Alaska numerous workmen on account of which employment it became obligated to pay [23] taxes under Title VIII of the Social Security Act. Between various dates from February 15, 1937, to January 28, 1938 (both dates inclusive), the plaintiff forwarded to the Collector of Internal Revenue at Tacoma, Washington its checks aggregating \$9,882.31 in payment of installments of Social Security Taxes accruing on account of its 1937 operations. Said checks were received, endorsed, and cashed by said Collector of Internal Revenue on the following dates, in the following amounts:

March 1, 1937	\$ 277.93
March 31, 1937	297.07
May 3, 1937	358.92
June 3, 1937	515.79
July 7, 1937	912.25
August 4, 1937	946.39
September 1, 1937	870.40
October 1, 1937	3,046.71
October 29, 1937	1,892.96

November 29, 1937	228.87
December 31, 1937	235.29
February 3, 1938	299.73
<hr/>	
Total	\$9,882.31

The said aggregate sum of \$9,882.31 so paid in installments included the employer's contribution in the sum of \$4,939.83 and the employee's contribution in the sum of \$4,942.48. The employer's contribution of \$4,939.83 was computed upon a total sum of \$493,983.14 of which total sum \$431,816.44 was wages paid in cash to such employees and the balance, \$62,166.70, was the estimated value of lodging and sustenance furnished such employees. Included in the sum of \$4,939.83 paid as employer's tax was the sum of \$621.67, being 1% of said \$62,166.70, the estimated value of such lodging and sustenance. Said sum of \$621.67 was paid in error in that the said estimated value of lodging and sustenance upon which said sum was computed and paid as a tax was not wages nor taxable as wages; that within the time provided by law, namely, on April 8, 1938, the plaintiff duly filed its claim with said Collector of Internal Revenue to whom said excess taxes were paid [24] for the refund of the same and the said claim was rejected in its entirety by the Commissioner of Internal Revenue on July 11, 1939; that said sum of \$621.67 with 6% interest thereon from the several dates of payment is justly owing to the plaintiff.

Second Cause of Action

As a second cause of action, the plaintiff repeats Paragraph I and II of the foregoing first cause of action and in addition thereto alleges that during the fishing and operating season of 1938 the plaintiff so transported to and employed in Alaska numerous workmen on account of which employment it became obligated to pay taxes under Title VIII of the Social Security Act. Between April 29, 1938, and January 27, 1939, the plaintiff forwarded to the Collector of Internal Revenue at Tacoma, Washington its checks in payment of installments of Social Security Taxes accruing on account of its 1938 operations, which checks were received, endorsed, and cashed by said Collector of Internal Revenue and included the following payments on account of the employer's contributions, namely:

April 29, 1938	\$ 366.97
July 29, 1938	1,099.39
October 31, 1938	3,070.46
January 27, 1939	294.95
<hr/>	
Total	\$4,831.77

The said aggregate sum of \$4,831.77 so paid as employer's tax was computed upon a total sum of \$483,177.06 of which total sum \$423,631.74 was paid in cash to such employees and the balance, \$59,545.32, was the estimated value of lodging and sustenance furnished such employees. Included in the sum of \$4,831.77 paid as employer's tax was the sum of \$595.45, being 1% of said \$59,545.32, the

estimated value of such lodging and sustenance. Said sum of \$595.45 was paid in error in that the said estimated value of lodging and sustenance upon which said sum was computed [25] and paid as a tax was not wages nor taxable as wages; that within the time provided by law, namely, on November 8, 1940, the plaintiff duly filed its claim with said Collector of Internal Revenue, to whom said excess taxes were paid, for refund of the same and said claim was rejected in its entirety by the Commissioner of Internal Revenue on December 20, 1930; that said sum of \$595.45 with 6% interest thereon from the several dates of payment is justly owing to the plaintiff.

Third Cause of Action

As a third cause of action, the plaintiff repeats Paragraphs I and II of the foregoing first cause of action and in addition thereto alleges that during the fishing and operating season of 1939 the plaintiff so transported to and employed in Alaska numerous workmen on account of which employment it became obligated to pay taxes under Title VIII of the Social Security Act. Between April 27, 1939, and January 30, 1940, the plaintiff forwarded to the Collector of Internal Revenue at Tacoma, Washington its checks in payment of installments of Social Security Taxes accruing on account of its 1939 operations, which checks were received, endorsed, and cashed by said Collector of Internal Revenue and included the following payments on account of the employer's contributions, namely:

April 27, 1939	\$ 376.40
July 28, 1939	1,201.70
October 30, 1939	3,358.59
January 30, 1940	232.19
<hr/>	
Total	\$5,168.88

The said aggregate sum of \$5,168.88 so paid as employer's tax was computed upon a total sum of \$516,888.80 of which total sum \$459,530.82 was paid in cash to such employees and the balance, \$57,357.98, was the estimated value of lodging and sustenance furnished such employees. Included in the sum of \$5,168.88 paid [26] as employer's tax, was the sum of \$573.58, being 1% of said \$57,357.98. Said sum of \$573.58 was paid in error in that the said estimated value of lodging and sustenance upon which said sum was computed and paid as a tax was not wages nor taxable as wages; that within the time provided by law, namely, on November 8, 1940, the plaintiff duly filed its claim with said Collector of Internal Revenue, to whom said excess taxes were paid, for the refund of the same and the said claim was rejected in its entirety by the Commissioner of Internal Revenue on December 20, 1940; that said sum of \$573.58 with 6% interest thereon from the several dates of payment is justly owing to the plaintiff.

Wherefore, plaintiff prays judgment against the defendant as follows:

On its first cause of action, in the sum of \$621.67 with interest thereon at the rate of 6% per

annum from the dates of the several installment payments made on account of the year 1937.

On its second cause of action, in the sum of \$595.45 with interest thereon at the rate of 6% per annum from the dates of the several installment payments made on account of the year 1938.

On its third cause of action, in the sum of \$573.58 with interest thereon at the rate of 6% per annum from the dates of the several installment payments made on account of the year 1939.

KERR, McCORD & CAREY

STEPHEN V. CAREY

J. L. COLLINS

Attorneys for Plaintiff

1309 Hoge Bldg.

Seattle, Washington

[Endorsed]: Filed July 8, 1941. [27]

[Title of District Court and Cause.]

No. 397

ANSWER

Comes now the United States of America, defendant in the above entitled action, by and through J. Charles Dennis, United States Attorney for the Western District of Washington, and Gerald Shucklin, Assistant United States Attorney for said District, and for answer to the complaint of the plaintiff on file herein, alleges as follows:

First Cause of Action

I.

The allegations of Paragraph I of plaintiff's complaint are admitted, except that it is denied that "plaintiff is justly entitled to the amount herein claimed from the United States."

II.

Defendant has no information from which to form a belief as to the allegations contained in paragraph II of plaintiff's complaint, and therefore denies the same.

III.

The allegations of paragraph III of plaintiff's complaint are admitted, except as to the allegation that "Said sum of \$621.67 was paid in error in that the said estimated value of lodging and sustenance upon which said [28] sum was computed and paid as a tax was not wages nor taxable as wages," which is denied. The defendant avers that the sum paid out for so-called lodging and sustenance is included within the meaning of Section 811 (a), Title VIII of the Social Security Act as wages. In accordance with the provisions of that Section the plaintiff is required to pay Social Security taxes thereon for all remuneration or wages paid to its employees. It is also denied that the sum of \$621.67, with six per cent interest thereon "is justly owing to the plaintiff."

Second Cause of Action

In answer to the plaintiff's second cause of action,

defendant's answer to paragraphs I and II of the First Cause of Action are hereby incorporated by reference and made a part hereof as though set forth in full. As there answered or modified, the allegations of the second cause of action are admitted, except that it is denied that there is anything "justly owing to the plaintiff."

Third Cause of Action

In answer to the plaintiff's Third Cause of Action, defendant's answer to Paragraphs I and II of the First Cause of Action are hereby incorporated by reference and made a part hereof as though set forth in full. The remainder of the allegations of this cause of action are admitted, except that it is denied that the "sum of \$573.58 was paid in error in that the said estimated value of lodging and sustenance upon which said sum was computed and paid as a tax was not wages nor taxable as wages." The defendant avers that the sum paid for lodging and sustenance is included within the statute (Section 811 (a), [29] Title VIII, of the Social Security Act), and upon which a tax was legally owing and paid. It is further denied that in paying the sum of \$573.58, with six per cent interest thereon, there is now any money "justly owing to the plaintiff" by reason thereof.

Wherefore, defendant prays that judgment be entered for the defendant and against the plaintiff, and that the defendant recover its costs and disbursements herein.

J. CHARLES DENNIS

United States Attorney

GERALD SHUCKLIN

Assistant United States
Attorney.

Received a copy of the within Answer this 24 day of Oct., 1941.

KERR, McCORD & CAREY

(J. L. C.)

Attorney for Plaintiff

[Endorsed]: Filed Nov. 24, 1941. [30]

[Title of District Court and Cause.]

No. 397

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

The above-entitled cause and cause No. 396, Pacific American Fisheries, Inc., a corporation, Plaintiff, v. United States of America, Defendant, were consolidated for trial and came on regularly for trial before the above-entitled court, John C. Bowen presiding therein, sitting without a jury, plaintiff in each cause appearing by their attorneys, Kerr, McCord & Carey, being represented in court by

Stephen V. Carey, and the defendant, United States of America, appearing by its attorneys, J. Charles Dennis, United States Attorney for the Western District of Washington, and Harry Sager, Assistant United States Attorney for said District, being represented in court by Thomas R. Winter, Special Assistant to the Chief Counsel for the Bureau of Internal Revenue, and witnesses for the plaintiffs and defendant having been sworn and having testified, exhibits having been introduced in court, written memoranda having been filed by counsel for both parties, oral argument had therein, and the court having, on September 26, 1942, announced his oral decision, and the court being fully advised, now makes the following: [31]

FINDINGS OF FACT

I.

That at all times hereinafter mentioned plaintiff was and now is a corporation organized and existing under the laws of the State of Nevada and duly qualified and authorized to do business in the State of Washington and in the Territory of Alaska; that plaintiff is a citizen of the United States and at all times it has borne true allegiance to the government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said United States; that plaintiff is the owner of the amount herein claimed from the United States and that no assignment or transfer of said claim or any part thereof or any interest therein has been made; that plaintiff's princi-

pal office and place of business has been and it is now at Seattle in the Northern Division of the Western District of Washington.

II.

That in the years 1937, 1938 and 1939 plaintiff was engaged in the business of catching and packing salmon in the territory of Alaska. In conducting such a business during the operating seasons of said years, it operated a number of canneries with necessary traps and floating equipment situated in remote or isolated locations in Alaska. In the year 1937, it operated a number of fish traps at Drier Bay on Prince William Sound, and canneries at Kake, Ketchikan, Port Althorp, and Rose Inlet in Southeastern Alaska, and a cannery at Sand Point in the Shumigan Islands. The said five canneries were operated during the succeeding seasons of 1938 and 1939. Said operations were carried on only during the fishing season, not exceeding several months in [32] each year, depending upon the run of fish in the several fishing districts. During the remainder of said years, said operations were closed down, the canneries for all practical purposes being deserted except for a watchman left in charge of each.

To carry on said operations efficiently or at all, it was necessary that the plaintiff in advance of the fishing and operating season transport most of its employees from Seattle, Washington, or other places in the States to said places in Alaska and return them at the end of the fishing and operating season.

During the fishing and operating season, it was necessary that the plaintiff, and it agreed that as part of its operations and in addition to cash was to furnish most of the employees with lodging and sustenance at their places of employment in Alaska, for otherwise no facilities for lodging and sustenance would have been available to them and it would have been impossible for the plaintiff to have carried on such operations at all, except that in cases where native Alaskan workers were employed and no lodging and sustenance furnished, additional cash wages were to be paid.

III.

During the fishing and operating season of 1937, the plaintiff so transported to and employed in Alaska numerous workmen on account of which employment it became obligated to pay taxes under Title VIII of the Social Security Act. Between various dates from February 15, 1937, to January 28, 1938 (both dates inclusive), the plaintiff forwarded to the Collector of Internal Revenue at Tacoma, Washington, its checks aggregating \$9,852.31 in payment of installments of Social Security taxes accruing on account of its 1937 operations. Said checks were received, endorsed, and cashed [32a] by said Collector of Internal Revenue on the following dates, in the following amounts:

March 1, 1937	\$ 277.93
March 31, 1937	297.07
May 3, 1937	358.92
June 3, 1937	515.79

July 7, 1937	912.25
August 4, 1937	946.39
September 1, 1937	870.40
October 1, 1937	5,046.71
October 29, 1937	1,892.96
November 29, 1937	228.87
December 31, 1937	235.29
February 3, 1938	299.73
<hr/>	
Total	\$9,882.31

The said aggregate sum of \$9,882.31 so paid in installments included the employer's contribution in the sum of \$4,939.83 and the employee's contribution, \$4,942.48. The employer's contribution of \$4,939.83 was computed upon a total sum of \$493,983.14 of which total sum \$431,816.44 was wages paid in cash to such employees and the balance \$62,166.70, was the estimated value of lodging and sustenance furnished such employees. Included in the sum of \$4,939.83 paid as employer's tax was the sum of \$621.67, being 1% of said \$62,166.70, the estimated value of such lodging and sustenance.

IV.

That during the fishing and operating season of 1938 the plaintiff so transported to and employed in Alaska numerous workmen on account of which employment it became obligated to pay taxes under Title VIII of the Social Security Act. Between April 29, 1938, and January 27, 1939, the plaintiff forwarded to the Collector of Internal Revenue at Tacoma, Washington its checks in payment of

installments of Social Security Taxes accruing on account of its 1938 operations, which checks were received, endorsed, and cashed by said Collector of Internal Revenue and included the following payments on account of the employer's contributions, namely:

April 29, 1938	\$ 366.97
July 29, 1938	1,099.39
October 31, 1938	3,070.46
January 27, 1939	294.25
<hr/>	
Total	\$4,831.77

The said aggregate sum of \$4,831.77 so paid as employer's tax was computed upon a total sum of \$483,177.06 of which total sum \$423,631.74 was paid in cash to such employees and the balance, \$59,545.32, was the estimated value of lodging and sustenance furnished such employees. Included in the sum of \$4,831.77 paid as employer's tax was the sum of \$595.45, being 1% of said \$59,545.32, the estimated value of such lodging and sustenance.

V.

That during the fishing and operating season of 1939 the plaintiff so transported to and employed in Alaska numerous workmen on account of which employment it became obligated to pay taxes under Title VIII of the Social Security Act. Between April 27, 1939, and January 30, 1940, the plaintiff forwarded to the Collector of Internal Revenue at Tacoma, Washington its checks in payment of installments of Social Security taxes accruing on ac-

count of its 1939 operations, which checks were received, endorsed, and cashed by said Collector of Internal Revenue and included the following payments on account of the employer's contributions, namely:

April 27, 1939	\$ 376.40
July 28, 1939	1,201.70
October 30, 1939	3,358.59
January 30, 1940	232.19
<hr/>	
Total	\$5,168.88

The said aggregate sum of \$5,168.88 so paid as employer's [34] tax was computed upon a total sum of \$516,888.80 of which total sum \$459,530.82 was paid in cash to such employees and the balance, \$57,357.98, was the estimated value of lodging and sustenance furnished such employees. Included in the sum of \$5,168.88 paid as employer's tax, was the sum of \$573.58, being 1% of said \$57,357.98.

VI.

That within the time provided by law, namely, on April 2, 1938, and November 8, 1940, the plaintiff duly filed its claims for refund for the years 1937, 1938 and 1939 with the Collector of Internal Revenue to whom said taxes were paid for the refunds of the same and that said claims were rejected and disallowed in their entirety by the Commissioner of Internal Revenue on July 11, 1939, and December 20, 1940, and this action was timely filed on July 8, 1941.

From the foregoing Findings of Fact, the Court makes the following:

CONCLUSIONS OF LAW

I.

That the value of lodging and sustenance furnished plaintiff's admitted employees constituted "wages" within the meaning of Section 811 (a) of the Social Security Act and as amended (Title 26 U. S. C. A., Sec. 1426 (a), Internal Revenue Code.)

II.

That the taxes assessed and collected, refunds of which are sought in this action, were in all respects legal and in strict accordance with the law.

III.

That the judgment should be entered dismissing plain- [35] tiff's complaint with prejudice and with costs to be taxed by the Clerk.

Dated this 13th day of October, 1942.

/s/ JOHN C. BOWEN,

United States District Judge.

Presented by

THOMAS R. WINTER,

Atty. for Def.

Copy received this 5th day of Oct., 1942.

KERR, McCORD & CAREY,

By A. M. U.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Oct. 13, 1942. Judson W. Shorett, Clerk. By E. M. Rosser, Deputy.

[Endorsed]: Lodged in the United States District Court, Western District of Washington, Northern Division, Oct. 5, 1942. Judson W. Shorett, Clerk. By E. M. Rosser, Deputy. [36]

In the District Court of the United States for the
Western District of Washington, Northern Division.

No. 397

ALASKA PACIFIC SALMON COMPANY, a
corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

The above-entitled cause and cause No. 396, Pacific American Fisheries, Inc., a corporation, Plaintiff, v. United States of America, Defendant, were consolidated for trial and came on regularly for trial before the above-entitled court, John C. Bowen presiding therein, sitting without a jury, plaintiff in each cause appearing by their attorneys, Kerr, McCord & Carey, being represented in court by Stephen V. Carey, and the defendant, United States of America, appearing by its attorneys, J. Charles Dennis, United States Attorney for the Western District of Washington, and Harry Sager, Assistant

United States Attorney for said District, being represented in court by Thomas R. Winter, Special Assistant to the Chief Counsel for the Bureau of Internal Revenue, and witnesses for the plaintiffs and defendant having been sworn and having testified, exhibits having been introduced in court, written memoranda having been filed by counsel for both parties, oral argument had therein, and the court having, on September 26, 1942, announced his oral decision, and the court having made and entered Findings of Fact and Conclusions of Law herein, now therefore, it is hereby [37]

Ordered, Adjudged and Decreed that the plaintiff's complaint be, and the same is hereby dismissed with prejudice and with costs to be taxed by the Clerk.

Dated this 13th day of October, 1942.

/s/ JOHN C. BOWEN,

Judge.

Presented by:

THOMAS R. WINTER,

Copy received this 5th day of Oct., 1942.

KERR, McCORD & CAREY,

By SJT. [38]

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Oct. 13, 1942. Judson W. Shorett, Clerk. By E. M. Rosser, Deputy.

[Endorsed]: Lodged in the United States District Court, Western Division of Washington, Northern Division, Oct. 5, 1942. Judson W. Shorett, Clerk.

[Title of District Court and Cause.]

No. 397

NOTICE OF APPEAL

Notice is hereby given that Alaska Pacific Salmon Company, a corporation, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit, from the final judgment entered in this action on October 13, 1942.

KERR, McCORD & CAREY,
STEPHEN V. CAREY,

Attorneys for Pacific American Fisheries, Inc., a
corporation, 1309 Hoge Building, Seattle,
Washington.

[Endorsed]: Filed Jan. 11, 1943. [39]

[Title of District Court and Cause.]

No. 397

COST BOND ON APPEAL

Know All Men by These Present that we, Alaska Pacific Salmon Company, a corporation, as principal, and American Surety Company of New York, a corporation, as Surety, acknowledge ourselves to be jointly indebted to United States of America, appellee in the above cause, in the sum of \$250.00 conditioned that:

Whereas, on the 13th day of October, 1942, in the District Court of the United States for the Western

District of Washington, Northern Division, in the above entitled and numbered cause, a judgment was entered in favor of the defendant dismissing the Plaintiff's complaint with prejudice and with costs against Plaintiff, and;

Whereas the Plaintiff has filed in the office of the Clerk of the said District Court a notice of appeal to United States Circuit Court of Appeals for the Ninth Circuit;

Now the condition of the above obligation is such that if the said Alaska Pacific Salmon Company, a corporation, shall prosecute its appeal to effect and answer all costs if the appeal is dismissed or the judgment affirmed, or such costs as the Appellate Court may if the judgment is modified, then the above obligation is void else to remain in full force and effect.

[Seal] ALASKA PACIFIC SALMON
 COMPANY, a corporation,
By VICTOR EFENDAHL,
 Vice President.
Attest: LOUIS L. STEADMAN,
 Secretary.

[Seal] AMERICAN SURETY COM-
 PANY OF NEW YORK,
By S. H. MELROSE,
 Resident Vice President.
Attest: B. L. LEASURE,
 Resident Asst. Secretary.

[Endorsed]: Filed Jan. 11, 1943. [40]

[Title of District Court and Cause.]

No. 397

ORDER EXTENDING TIME TO
DOCKET APPEAL

It is ordered that the time within which to docket the record on appeal is hereby extended to and including April 1, 1943.

Done in open court this 9th day of February, 1943.

JOHN C. BOWEN,
United States District Judge.

Presented by:

S. V. CAREY,
Attorney for Plaintiff.

Approved:

THOMAS R. WINTER,
Attorney for Defendant.

[Endorsed]: Filed Feb. 9, 1943. [41]

United States District Court, Western District of
Washington, Northern Division

No. 396

PACIFIC AMERICAN FISHERIES, INC., a
corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant,

and

No. 397

ALASKA PACIFIC SALMON COMPANY, a
corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

STIPULATION FOR RECORD ON APPEAL

Whereas the above entitled actions were tried together and involve only the same controlling questions of law and fact, it is stipulated that they be heard together on appeal on the same record consisting of the following:

In Pacific American Fisheries, Inc., a Corporation,
vs. United States of America, No. 396

1. Complaint.
2. Answer.
3. Findings of Fact and Conclusions of Law.
4. Judgment.
5. Notice of Appeal.
6. Cost Bond on Appeal.
7. Order Extending Time to Docket Appeal.

[42]

In Alaska Pacific Salmon Company, a Corporation,
vs. United States of America, No. 397.

8. Complaint.
9. Answer.
10. Findings of Fact and Conclusions of Law.
11. Judgment.
12. Notice of Appeal.
13. Cost Bond on Appeal.
14. Order Extending Time to Docket Appeal.

In Cases Nos. 396 and 397 as Consolidated:

15. Transcript of proceedings as prepared by E. E. Lescher, court reporter, consisting of oral evidence of Russell Mowry and Fred W. Tegtmeyer, witnesses called by plaintiffs, and oral evidence of August Buschmann, William Hecker and Conrad Espe, witnesses called by defendant, with stipulation attached to said transcript relative to material parts of labor contracts introduced in evidence as exhibits by counsel for defendant.

16. This stipulation.

Dated at Seattle, Washington this 22nd day of March, 1943.

KERR, McCORD & CAREY,
STEPHEN V. CAREY,

Attorneys for Plaintiffs.

J. CHARLES DENNIS,
THOMAS R. WINTER,

Attorneys for Defendant.

[Endorsed]: Filed Mar. 23, 1943. [43]

[Title of District Court Causes.]

Nos. 396 and 397

Consolidated for Appeal

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Judson W. Shorett, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing type-written transcript of the consolidated record on appeal, consisting of pages numbered from 1 to 43, inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above and foregoing causes as is required by Stipulation for Record on Appeal of counsel, filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court at Seattle, except as to the reporter's tran-

script of proceedings, filed March 23, 1943, the original of which is enclosed herewith as part of the record on appeal in these causes, consolidated for appeal, and that the same constitute the record on appeal herein from the judgment of the United States District Court for the Western District of Washington, to the United States Circuit Court of Appeals for the Ninth Circuit.

I do further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office for making record, and certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit, to-wit:

(Clerk's fees, Act of Feb. 11, 1925) for	
making record, certificate of re-	
turn, 106 folios @ \$.05 per folio....	\$ 5.30
Appeal fee, \$5.00 each case.....	10.00
Certificate of Clerk to Transcript of	
Record on Appeal .....	.50
	<hr/>
Total	\$15.80

[44]

I further certify that the foregoing fees have been paid by attorneys for the appellants.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, in said District, this 25th day of March, 1943.

[Seal]

JUDSON W. SHORETT,

Clerk.

By E. REDMAYNE,

Deputy.

[Title of District Court and Causes.]

TESTIMONY

Be It Remembered that on, to-wit: July 8, 1942, at the hour of 10:00 o'clock a.m., the above-entitled and numbered causes of action, consolidated for purposes of trial, came on regularly for hearing in the above-entitled court before the Honorable John C. Bowen, District Judge, sitting without a jury.

The plaintiffs appearing by Stephen V. Carey, Esq. (of Messrs. Kerr, McCord & Carey) their attorneys and counsel;

The Defendant appearing by Thomas R. Winter, Esq., Chief Counsel Treasury, its attorney and counsel.

Thereupon, the following proceedings were had, and testimony given, to-wit:

The Court: These two cases are being consolidated for [2*] trial. Are the parties and counsel ready to proceed with the trial?

Mr. Winter: Yes, your Honor. The defendant is ready. In that connection, your Honor, may I ask to have associated as amicus curiae counsel, Mr. Griffin, representing the Alaska Fishermen's Union?

The Court: Is there any objection?

Mr. Carey: Yes, there is. I do not know of any interest that the Alaska Fishermen's Union has in this matter. If the Alaska Fishermen's Union has an interest, they should not be represented here

*Page numbering appearing at foot of page of original Reporter's Transcript.

as *amicus curiae*. They should be represented by way of intervention. I do not know what interest they claim to have. I can guess at it, though. The fact of the matter is that these cases were started, it happens, just one year ago—July 8th. Within a very few days after the filing of the complaint, Mr. Gershon called me, stating that he was representing the Alaska Fishermen's Union, indicating that he had, or might have some interest in this matter, and I either furnished him with copies of the complaints, or gave him copies of my complaints and permitted him to copy them. I have forgotten which, but it doesn't make any difference, anyway. And since that time I have heard nothing from Mr. Gershon until this very moment.

Now, if the Alaska Fishermen's Union have any interest in this matter, they have had a full year to intervene and file whatever would be proper pleadings in the case, in order to let us know what their position is and what the issues of fact are to be tried out, if there are any between ourselves and the union. They have [3] had knowledge of it for a year, and have done nothing, and they therefore have no right to be heard as *amicus curiae*. They might have had a right to intervene if the application had been made timely. We are prepared to try our case against the Government. We are not prepared to try our case against anybody else.

Mr. Winter: The only interest that the Alaska Fishermen's Union have in this is that they are

the bargaining agent for the employees vitally concerned with sustaining the position of the Commissioner in this case, and that is that wages—not only the basic pay of wages but the reasonable value of compensation in the form of board and lodging should be included in their Social Security Tax, and they merely ask to appear here as *amicus curiae* to aid the court in setting forth, or attempting to be an aid to the court in determining whether or not it has been considered by the employees, as well as the employers, that the reasonable value of the board and lodging should be included in the wages.

There is no issue here about the reasonableness of the amount which has been included. That is a matter which has been computed by the employers themselves.

The Court: Is that a point which the Government has had in mind and worked on with you right along in this case?

Mr. Griffin: No.

Mr. Winter: No. The Government only has an interest in construing the tax laws enacted by Congress. Of course, we welcome the actual facts from the employers as well as from the employees in the matter, as they may be of some [4] aid to the Court. Now, it seems to me that they might appear as *amicus curiae* in the sense that they might want to take part in the briefing. I do not expect them to take an active part in the defense of the case. The Government is the defendant as to whether

or not these people erroneously paid the taxes under the Social Security Act.

Mr. Carey: In the end, it seems to me it is not what my opinion is, or what Mr. Winter's opinion is, or what the opinion of the Alaska Fishermen's Union is. The case here is to be determined upon the facts and ultimately rests on the opinion of the Court. As I said before, if they have any issue, and make the proper showing, I presume the Court would permit them to intervene——

Mr. Winter: (Interrupting) If the Court please, if there is any objection on the part of counsel, we won't insist upon it. Mr. Griffin may sit with me informally in the case.

The Court: Very well. In view of the statement by counsel, then, you may proceed. I take it that you withdraw the request to have him appear as *amicus curiae*.

Mr. Winter: Yes, we will withdraw the request.

The Court: Is there any objection to Mr. Winter having Mr. Griffin associated with him informally, the same as some other member of the Bar?

Mr. Carey: I have no objection to that.

The Court: Mr. Griffin, you may feel free to consult with Mr. Winter about the matter.

Mr. Carey: But I have this to say, however, that if any issue in any form by counsel will be injected on [5] behalf of the Alaska Fishermen's Union, I object to it——

Mr. Winter: (Interrupting) We are not raising any issue.

Mr. Carey: Now, pardon me. The Court asked me a question, and I am trying to answer it.

The Court: Just a minute, Mr. Winter.

Mr. Winter: Yes, your Honor.

Mr. Carey: If any contention on behalf of the Alaska Fishermen's Union is made, I will, of course, object, unless it is based upon some evidence properly introduced.

The Court: Of course, the Court will consider the questions as they arise in the case. You may proceed, then, gentlemen.

(Thereupon an opening statement of the plaintiffs' cases was made by Mr. Carey.)

PLAINTIFFS' CASES

Mr. Carey: I will call Mr. Mowry.

RUSSELL MOWRY

called as a witness on behalf of Plaintiffs, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Carey:

Q. Will you please state your name?

Mr. Winter: We will object to the introduction of any testimony on the ground that the complaints do not state a cause of action, and move the Court to dismiss the cases.

(Thereupon argument was had upon the motion.) [6]

(Testimony of Russell Mowry.)

Mr. Winter: For the purpose of my motion, and only for the purpose of my motion, of course, I must concede that everything is true as alleged by the complaints. However, I do not think that there will be any serious discrepancy in the testimony in this matter.

The Court: Do you anticipate that there might be a situation arise where you would claim to have the right to have the pleadings amended to include something that is not obviously within the pleadings as now drawn?

Mr. Carey: I am not anticipating any such thing.

The Court: You believe that the proof will be within the issues as now framed?

Mr. Carey: I think so. There is nothing to the contrary now in my mind.

The Court: Well, as to the motion made, the ruling of the Court will be that the Court overrules the motion, with the right of the defendant to raise the same question in all appropriate ways in further proceedings of this case.

You may proceed.

Q. (Mr. Carey, continuing) Will you state your name, please? A. Russell Mowry.

Q. Mr. Mowry, were you sometime in the past connected in an official way with the Pacific American Fisheries, the plaintiff in Cause No. 396?

A. I was.

Q. And what was your position?

A. I was comptroller of the Pacific American

(Testimony of Russell Mowry.)

Fisheries for the period from 1938 through June 1, 1939.

Q. Nineteen hundred and when? [7]

A. 1938. Just a minute. I believe it was in 1937. In 1937, I was appointed as comptroller.

Q. In 1937 up to very recently?

A. Yes, sir.

Q. You were comptroller of the company then during the period of its operations of 1937, 1938 and 1939? A. That is right.

Q. As comptroller of the company, was it part of your official duties to familiarize yourself with the operations of the company at the various places in which it operated in Alaska? A. Yes.

Q. During those years, the actual operations so far as catching and packing fish were concerned, were carried on in Alaska?

A. That is right.

Q. They had no operations outside of Alaska?

A. No.

Q. Will you state where, in 1937, the Company for its own account carried on operations in Alaska?

A. At——

Mr. Carey: (Interrupting) Perhaps it would be more convenient, if counsel does not object, for me to ask that in the same order in which I gave them to your Honor in my opening statement.

Mr. Winter: There is no objection to that.

Mr. Carey: All right.

(Testimony of Russell Mowry.)

Q. (Mr. Carey, continuing) During the year 1937, did the Company operate at Alitak?

A. Yes. [8]

Q. Alitak is located where?

A. That is on the southwestern tip of Kodiak Island.

Q. During the year 1938, did the company operate at that same location? A. Yes, it did.

Q. And also during the year 1939?

A. Yes.

Q. During the year 1937 did the company operate at Kasaan? A. Yes.

Q. Kasaan is where?

A. Kasaan is about 30 miles west of Ketchikan.

Q. Did the company operate at that same location in 1938? A. Yes.

Q. Did it operate at Kasaan in 1939?

A. No.

Q. Did the Company operate at King Cove in 1937? A. Yes.

Q. The King Cove cannery is located where?

A. It is about 100 miles east of Dutch Harbor, and 250 miles west of Seward.

Q. West of Seward?

A. Yes, on the Alaska Peninsula, on the south side.

Q. Was the King Cove cannery operated in 1938? A. Yes.

Q. And in 1939? A. Yes.

(Testimony of Russell Mowry.)

Q. And did the company operate at Naknek on Bristol Bay in 1937? A. Yes.

Q. And did it operate in that location in 1938? [9]

A. Yes.

Q. And in 1939? A. That is right.

Q. Did the company operate at Nornek on Bristol Bay in 1937? A. Yes.

Q. Did it operate at that same location in 1938? A. Yes.

Q. And in 1939? A. No.

Q. No operation at Nornek—

A. (Interrupting) —not in 1939.

Q. Not in 1939? A. That is right.

Q. Did the company operate at Nushagek on Bristol Bay in 1937? A. Yes.

Q. In 1938? A. No.

Q. No operation at Nushagek in 1938?

A. That is right.

Q. Did it operate at Nushagek in 1939?

A. Yes.

Q. Did the company operate at Petersburg in 1937? A. Yes.

Q. And Petersburg is where?

A. Oh, it is north of Ketchikan about 60 miles, I would say.

Q. Well, it is in southeastern Alaska?

A. It is in southeastern Alaska, yes.

Q. Between Ketchikan and Juneau? [10]

A. Between Ketchikan and Juneau, yes.

Mr. Winter: That is the town of Petersburg?

(Testimony of Russell Mowry.)

Mr. Carey: Yes, the town of Petersburg.

Q. Did the company operate at Petersburg in 1938? A. Yes.

Q. In 1939? A. No.

Q. No operation in 1939 at Petersburg?

A. That is right.

Q. Did the company operate at Port Moller in 1937? A. Yes.

Q. And where is Port Moller?

A. Well, Port Moller is on the northwest side of the Alaska Peninsula, about 200 miles east of Dutch Harbor.

Q. Did the company operate at Port Moller in 1938? A. No.

Q. Did it operate at Port Moller in 1939?

A. Yes.

Q. And did the company operate at Shumagin in 1937? A. Yes.

Q. That operation is also known as the Squaw Harbor operation?

A. Yes, sir; that is right.

Q. And where is the Shumagin or Squaw Harbor operation located?

A. Why, it is in the Shumagin Islands, and it is about 50 miles east of the King Cove Cannery.

Q. Both of those are east of Yunanak Pass or Dutch Harbor? A. Yes.

Q. Did the company operate at Shumagin or Squaw Harbor in [11] 1938? A. Yes.

Q. And in 1939? A. Yes.

(Testimony of Russell Mowry.)

Q. Now, coming to the Alitak Cannery in particular, you say that that is located on the Southwestern end of Kodiak Island? A. Yes.

Q. What is there located at Alitak other than the cannery itself and the attendant operations there? A. There is nothing there.

Q. How large a cannery is that?

A. Oh, it is a cannery that could put up around 100,000 or 125,000 cases of salmon—a three-line cannery.

Q. As canneries go, is that a large or a small operation?

A. It is a little better than average.

Q. Now, these operations were carried on in all three years, 1937, 1938 and 1939?

A. Yes.

Q. Would the operations in one year be typical for the other two years? A. Yes, sir.

Q. So that if you would describe what was done in one year, that would apply to the other two years? A. That is right.

Q. How far is the Alitak Cannery distant from any settlement or established town or village?

A. Well, it is about 60 miles west of the town of Kodiak, and it is about—oh, probably 150 miles west of Seward. [12]

Q. The town of Kodiak is located on the other end, or the northeastern end of Kodiak Island?

A. Yes.

Q. Are there any means of communication by land between the two ends of the Island?

(Testimony of Russell Mowry.)

A. No.

Q. Any regular steamship service between the two? A. No.

Q. And how far would you say it was from Cordova?

A. It is about 150 miles, I think it is.

Q. Taking a representative year, approximately how many men are employed at the Alitak Cannery?

A. Oh, there are about 180 or 190.

Q. And do those men live permanently in Alaska, or do they come from somewhere else?

A. 90 per cent. of them would come from Seattle.

Q. And during what period of the year are they stationed at the cannery?

A. Well, they generally leave here maybe about the middle of April, the first bunch, and come back about the middle of September or the end of September.

Q. And do those dates that you have now mentioned measure the actual operating season for the cannery for each succeeding year?

A. Yes, sir.

Q. In 1937, how were the men from the outside—that is, men from the States, transported to and from the cannery?

A. Why, in 1937, the Pacific American Fisheries operated their own ocean-going vessels, and they were transported on our own ocean vessels. [13]

(Testimony of Russell Mowry.)

Q. Was that transportation furnished by the company to the men as part of the operation?

A. Yes.

Q. These men embarked where on the outward trip?

A. Either at Seattle or Bellingham.

Q. And were discharged where at the end of the season?

A. Either at Bellingham or Seattle.

Q. On the trip up and the trip back, were the men furnished with their food and lodging aboard the ship?

A. Yes.

Mr. Winter: I object to that. If the contract of employment was in writing, that would be the best evidence, and I understand that the contract with all of the members was in writing, was it not?

The Witness: Yes, sir.

Mr. Winter: Then I object to this. The contract is the best evidence.

The Court: Do you have the contract available?

Mr. Carey: I do not think that it is.

The Court: Is there any dispute between the parties as to the facts?

Mr. Carey: It seems needless to encumber the record with a lot of written documents.

The Court: Is there a serious dispute as to whether or not the answer to the question should be "yes" or "no"?

Mr. Winter: No, I think not, but I think if

(Testimony of Russell Mowry.)

this is furnished as part of the compensation according to the contract, we should have the contract.

Mr. Carey: I will agree, if counsel insists, to [14] furnish the contract later. I did not anticipate that a question would be raised concerning that.

The Court: Does that meet your objection, Mr. Winter? He would like to have the question answered, and he states that he will produce the contract for introduction in evidence later.

Mr. Winter: Well, he should produce it now. The question here is whether or not——

Mr. Carey: (Interrupting) Well, I will withdraw the question.

Q. (Mr. Carey, continuing) The fish packed at the Alitak Cannery are obtained from what sources?

A. Well, they are obtained from traps, gillnets and seines.

Q. What is the fact as to whether the operations at that cannery are carried on at definite certain hours daily or at irregular times?

A. Well, the packing is irregular during the height of the season. You never know when the seine boats are coming in, and you have to have the crews ready at practically the whole 24 hours to can fish.

Q. The men that are brought to the cannery are lodged and boused—are lodged and fed how?

(Testimony of Russell Mowry.)

A. They have bunkhouses for the different groups of men, and they have mess houses for the different groups, and all the men eat there.

Q. Well, who operates these mess houses and bunkhouses? A. The company does.

Q. And where are they located?

A. Right at the cannery.

Q. What is the reason the company operates its own mess [15] houses and bunkhouses at the cannery during the season?

A. It is part of the operating necessity, to have the men there and the meals there, so that the meals and the men can dovetail with the operation.

Q. Would it be possible to efficiently operate the cannery at that remote place under any different arrangement? A. No.

Q. Would it be possible to operate the cannery leaving the men to provide for their own board and lodging? A. No.

Q. At Alitak, what is the fact as to whether or not the company maintains medical service?

A. Well, the Company at Alitak has maintained a doctor there, due to the remoteness of the location.

Q. When you say "a doctor", do you mean a regularly licensed physician?

A. In most cases it was a regularly licensed physician.

Q. And what service does he render or perform?

A. Why, he is strictly the medical man and the

(Testimony of Russell Mowry.)

first aid man, taking care of the injured and sick people.

Q. What is the reason for maintaining a licensed physician at Alitak?

A. Well, you are isolated there from any other doctor. There is no other doctor around there, and no chance of getting any medical attention in there, and it is just a humane thing to do, and to protect your operation.

Q. That is what I meant, was it in relation to the efficiency of operation?

A. Oh, yes; fellows might get fish poisoning and you would have to take care of the them. [16]

Q. Is that more or less of a common thing?

A. In some canneries, sometimes it is.

Q. And occasionally they have accidents, more or less serious? A. Yes.

Q. Now, you say the operation as you have described it in 1937 would equally apply for the other two years? A. Yes, sir.

Q. At Alitak? A. Yes.

Q. Now, coming to the next cannery, at Kasaan, you said that that is located in southeastern Alaska?

A. That is right.

Q. And about how far distant from the nearest established settlement, or town or village?

A. About 30 miles.

Q. What is that nearest settlement?

A. Ketchikan.

Q. Would it be possible for the employees em-

(Testimony of Russell Mowry.)

ployed at that cannery during the fishing season to live at Ketchikan and work at the cannery?

A. No.

Q. How many men on an average are employed at Ketchikan during the season?

A. About 200.

Q. That is a relatively large operation?

A. Yes, sir.

Q. Does the length of the season at Kasaan, or at the southeastern Alaska points differ somewhat from the length of the season either at Bristol Bay or to the westward on [17] the Peninsula?

A. The season at Kasaan starts a little later than it does to the westward, but it closes a few days later.

Q. Generally, you get a different class of fish there, don't you? You get pinks in southeastern Alaska, do you not?

A. Yes, sir.

Q. Now, the majority of the men employed during the season at Kasaan are obtained from where?

A. From Seattle.

Q. And did you state what the normal season is at Kasaan?

A. Oh, from the—the extreme limits are from about the first of April to the end of September.

Q. Is board and lodging furnished at Kasaan during the operating season substantially in the same manner and for the same reasons that you have already described with reference to Alitak?

A. Yes.

(Testimony of Russell Mowry.)

Q. And what you have said about 1937 would apply equally in 1938 at Kasaan?

A. That is right.

Q. And you said that there was no operation in 1939 at Kasaan? A. That is right.

The Court: If there are any summarizations, you might like to make, such as obtain there with reference to any other canneries where the condition is similar to that described, you may so state.

Mr. Carey: I have given it some consideration, but I think this is the most expeditious way. [18]

The Court: If you can shorten it— —

Mr. Carey: (Interrupting) I will.

The Court: (Continuing) —by having it apply to another cannery, what he has said with reference to the one that he has been speaking of, why, that would save time.

Mr. Carey: I will do that. I have that in mind, and I think that I can bunch some of these up.

Q. (Mr. Carey, continuing) Are the hours of operation at Kasaan irregular for the same reasons already stated? A. Yes, sir.

Q. And the source of supply at Kasaan is what—traps or seines? A. Principally traps.

Q. Principally traps? A. Yes, sir.

Q. And the fish caught in the traps are brought in from what distance?

A. Oh, a distance of 60 or 70 miles from the cannery.

Q. And are they brought in at irregular hours?

(Testimony of Russell Mowry.)

A. Well, a lot depends on tides, winds and storms, so they do come in at all hours of the day.

Q. That is what I mean, that there is a variation of the daily operation dependent upon weather conditions, tides and other factors?

A. That is right.

Q. Is it necessary to keep the crew constantly present at the cannery to meet the conditions as they may exist from day to day?

A. That is right; available for work. [19]

Q. How about the first aid feature at Kasaan? Do you maintain a doctor there?

A. We maintain a first aid man.

Q. What distinction do you make between a first aid man and the doctor that you have described at Alitak?

A. The first aid man is generally a medical student or an interne, and the close proximity of Ketchikan to Kasaan makes it unnecessary to have a doctor there.

Q. So that the medical attendant at Kasaan is essentially a first-aid man, rather than a regular physician?

A. That is right.

Q. Now, you have stated that you had operations at King Cove and at Shumagin or Squaw Harbor in all three years of 1937, 1938 and 1939?

A. That is right.

Q. Those two canneries are relatively close to each other?

A. That is right.

Q. And out 'way to the westward along the Alaska Peninsula?

A. That is right.

(Testimony of Russell Mowry.)

Q. King Cove Cannery is on the mainland?

A. That is right.

Q. And the Shumagin or Squaw Harbor cannery is in the Shumagin Islands?

A. That is right.

Q. What is the distance between the two canneries, approximately? A. About 50 miles.

Q. 50 miles? A. About 50 miles, yes.

Q. And how far distant would they be from Juneau or any other [20] point?

A. Well, the nearest point of any consequence is Seward.

Q. Well, how far distant is Seward?

A. About 250 miles.

Q. Are there any facilities available at King Cove or Shumagin for the housing and feeding of the employees during the season other than such mess houses and bunk-houses as the company itself furnishes? A. No.

Q. Are lodging and meals furnished Shumagin and King Cove during the season in substantially the same manner, and for the same reasons you have already described with reference to Alitak?

A. Yes, sir; for the same reasons.

Q. How about the maintenance of a doctor or a first aid man at either King Cove or Shumagin?

A. Well, we have always employed a licensed physician at Shumagin, to take care of both canneries.

Q. And that is for the reasons that you have already described? A. That is right.

(Testimony of Russell Mowry.)

The Court: At this point, we will take a brief recess of five minutes.

(Recess)

The Court: You may proceed.

Q. (Mr. Carey, continuing) Now, what is the length of the operating season at King Cove and Shumagin?

A. The over-all length is about from the first of April to the middle of September.

Q. And the fish packed at these two canneries, I presume, are obtained from substantially the same character of [21] sources?

A. Traps, gillnets and seines.

Q. The cannery operation—the daily operation then is irregular, for the reasons that you have already stated?

A. Yes, sir; they are irregular—the operations are irregular for the reasons as I have already stated.

Q. And are the King Cove and Shumagin plants about the same size or capacity?

A. Well, King Cove has a little larger capacity than the Shumagin Cannery.

Q. And what is the relative size of the two plants?

A. Oh, King Cove can pack, in good years, an average of a hundred and seventy-five, and Shumagin will probably pack one hundred fifty.

Q. King Cove would rate as a relatively large cannery?

(Testimony of Russell Mowry.)

A. Probably the largest in Alaska.

Q. And the Shumagin probably larger than the average? A. That is right.

Q. Now, you stated that there were three canneries at Bristol Bay, Naknek, Nornek and Nushagek? A. That is right.

Q. They are all located relatively close to each other?

A. Oh, they are all located in Bristol Bay. Naknek and Nornek are on the southern part, and Nushagek is on the northern part.

Q. Of the Bay? A. Of the Bay.

Mr. Carey: I presume your Honor knows where Bristol Bay is.

The Court: Yes. [22]

Q. (Mr. Carey, continuing) Well, are they located sufficiently close together so that the operating conditions at one place are substantially the same as at the others?

A. They are practically identical.

Q. And what are the capacities of these three canneries on Bristol Bay?

A. Oh, they each can put up around 125,000 cases a year.

Q. And that would be at least the average?

A. That would be their capacity.

Q. Yes. A. And their average.

Q. And what number of men are employed during the season at these three Bristol Bay locations? A. Oh, about 600—600 or 700.

(Testimony of Russell Mowry.)

Q. That is, at the three places?

A. Yes, sir.

Q. And would they be equally divided as between the three canneries?

A. Pretty near, yes.

Q. Now, does the fishing or the operating season on Bristol Bay differ from the operating season at the other locations that you have already mentioned?

A. Yes. It is different in that they fish entirely by seine boats propelled by sail, and they have a very short and intensive season.

Q. And what kind of fish do they pack?

A. They pack almost exclusively red salmon.

Q. And the run of red salmon available for packing is over what period of time, ordinarily?

[23]

A. About the month of July.

Q. The month of July only? A. Yes, sir.

Q. Now, are there any accommodations for lodging or sustenance at these canneries other than the accommodations furnished by the company itself? A. No, none at all.

Q. And are those conditions furnished by the company for the same reasons that you have already described, taking Alitak as a representative?

A. That is right.

Q. And the means of getting the men to and from the cannery are the same as you have already described? A. Yes.

(Testimony of Russell Mowry.)

Q. How about medical aid furnished on Bristol Bay?

A. Well, we have a licensed doctor at Naknek who also takes care of Nornek, which is just across the river, and at Nushagek we have a first-aid man, as the Government has a hospital right close to there.

Q. Now, what you have already said covers the three Bristol Bay canneries?

A. That is right; the three canneries.

Q. You mentioned the cannery at Port Moller?

A. Yes.

Q. Which you said is on the northerly side of the Alaska Peninsula between Dutch Harbor and Bristol Bay?

A. That is right.

Q. And about how far east of Dutch Harbor is it, would you say?

A. About 200 miles east of Dutch Harbor, and about 400 miles [24] from the other canneries in Bristol Bay.

Q. It is about a third of the way from Dutch Harbor to Bristol Bay?

A. That is right.

Q. What sort of operation is that?

A. That cannery produces about 25,000 cases of salmon per year.

Q. That is a relatively small operation?

A. That is a relatively small operation.

Q. And about how many men are employed during the season there?

A. About 100.

Q. 100?

A. Yes, sir.

(Testimony of Russell Mowry.)

Q. And is the season at Port Moller longer or shorter than at Bristol Bay?

A. It is a little bit longer.

Q. Well, between what dates do you normally operate at Port Moller?

A. Well, the men get there about the first of June and leave there around the end of August.

Q. And what is the nearest permanent settlement to Port Moller? How far distant?

A. Dutch Harbor, about 200 miles.

Q. Are there any accommodations at Port Moller for the housing and feeding of the men other than those furnished by the Company itself?

A. No, none whatever.

Q. And is the housing and sustenance furnished there to the extent required on account of the number of men substantially the same as at Alitak, for instance? [25]

A. Yes.

Q. And for the same reason?

A. And for the same reason.

Q. Now, in the years that you operated—in 1937 and 1939, you operated at Port Moller, but you had no operation at all in 1938, I understand?

A. That is right.

Q. That leaves but one remaining cannery in the list, and that is at Petersburg. The Petersburg cannery was operated in '37 and '38, but not in 1939, as I understand it?

A. That is right.

Q. And that cannery is located in the town of Petersburg?

A. Yes.

(Testimony of Russell Mowry.)

Q. In southeastern Alaska? A. Yes.

Q. How large a place is Petersburg?

A. Oh, I would say that it is a town of about 2,000—1500 or 2000 people.

Q. And at what time of the year——

A. (Interrupting) During the summer.

Q. Are those permanent residents?

A. No. That is just during the summer.

Q. During the summer? A. Yes, sir.

Q. And are there any canneries at Petersburg other than that of the Pacific American Fisheries?

A. There is one small cannery run by Keene Taylor, and the Scow Bay Packing Company.

Q. Does the company maintain accommodations for lodging and feeding its employees at Petersburg as at the other [26] canneries described?

A. Yes, sir.

Q. And for substantially the same reason?

A. Yes, sir.

Q. The fish packed at Petersburg are obtained from what sources?

A. From traps and seines.

Q. Now, how does it happen that at Petersburg, which you say is an established community, the company finds it necessary to maintain its own accommodations for lodging and feeding its employees during the season?

A. Well, the town is not big enough to accommodate the influx of cannery help during the cannery season. It is just economically impossible

(Testimony of Russell Mowry.)

for the local people there to furnish the food and lodging.

Q. So, as a practical matter, you are confronted with the same situation as at a cannery farther removed from an established settlement?

A. That is right.

Q. Does the matter of the irregularity of the incoming fish have anything to do with the necessity of maintaining your own accommodations at the cannery there?

A. Where you have seine fish, you never know when they are coming in, and you have to have the crew standing by.

The Court: I wonder if it is material to show the necessity of furnishing food and lodging. The question is whether it was done or not, isn't it?

Mr. Carey: What is that?

The Court: Is not the only question whether or not the company actually did furnish lodging and food to the [27] men?

Mr. Carey: Oh, no; the question is the circumstances under which it was furnished—whether it was furnished by way of additional compensation, or whether it was furnished as a matter of operating necessity.

The Court: Well, if the men want it, and the company furnishes it, as part of their compensation, it is difficult for the Court at this time to see why it is material as to why it is necessary to be so furnished or not, but I will hear it.

Mr. Carey: Of course, we admit that it is ne-

(Testimony of Russell Mowry.)

cessary for workmen to have a place to live and eat.

The Court: I think that you know that that is not the point.

Mr. Carey: I did not catch the point of your Honor's suggestion.

The Court: Whether or not it was necessary or not for the men to receive it from the company, or whether they might have received it from some other source, other than from the company, it seems to me at this stage, is not particularly important, but if you think it will turn out to be important, of course——

Mr. Carey: (Interrupting) Well, that is the point of our claim.

The Court: All right.

Mr. Carey: That will be our direct examination, your Honor, and I would like to reserve the right during the noon hour to get a copy of that contract.

The Court: You may do that, and then ask him such further questions as you may need to ask in that [28] connection. That right is reserved. Any cross examination?

Mr. Winter: I would like to reserve my cross examination until we have the contract here.

The Court: All right. Step down. Call your next witness.

(Witness excused)

Mr. Winter: I would not ask to have the con-

tract for every year, but I would like to get a representative contract.

Mr. Carey: If you will tell me what year you want, I will try to get that particular contract.

Mr. Winter: I think 1938 would be a good contract for a representative year, that is, the contract for each cannery. If you will agree that in all contracts there is a provision similar to Section 21 of the contract of 1942, that is, where the company does not furnish room and board it shall pay the men in the Southeastern District south of Yakutat, \$60.00 a month and in the balance of Alaska \$70 a month, that will be all right with me.

Mr. Carey: No, I cannot make a stipulation as to a contract that I do not have any knowledge of.

Mr. Winter: Well, this is the contract made by the Pacific American Fisheries.

Mr. Carey: Well, I cannot agree to that.

Mr. Winter: Well, we want to see all the contracts, then.

The Court: Proceed, gentlemen. I think that it might not be out of place for the Court to remind counsel that I think it will be appropriate for all of us to avoid [29] tendencies to become excited. I want to assure both counsel that I do not think that that is necessary. Let us try to avoid becoming excited, or speaking in an excited voice.

Mr. Carey: I assume that your Honor is directing that particularly——

The Court: (Interrupting) I am not directing

it to either counsel. I am making a statement to till concerned in the case.

Mr. Carey: All I say I am going to do is that, to the best of my ability, I am going to try to produce the contract after the noon hour. I will try my best to get it during the noon hour.

The Court: That may be true. And I will repeat that the Court's statement is not inspired by the single statement of either counsel. It is inspired by what has transpired during the course of the morning's testimony.

FRED W. TEGTMEYER,

called as a witness on behalf of the Plaintiffs, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Carey:

Q. Will you state your name?

A. Fred W. Tegtmeier.

Q. How do you spell your last name?

A. T-e-g-t-m-e-y-e-r (spelling).

Q. You are connected in some official capacity with the Alaska Pacific Salmon Company? [30]

A. Yes, sir.

Q. And that company, as I understand it, was formed in the year 1939—1929, rather.

A. Yes, sir.

Q. And has operated in Alaska either at one place or another every year since?

(Testimony of Fred W. Tegtmeyer.)

A. Yes, sir.

Q. And what has been your position during those years with the company?

A. From 1929 to 19—in 1929, I was travelling auditor. From 1930 to 1936, inclusive, I was cannery bookkeeper. From 1937 to date, I am the home office auditor.

Q. Now, as the result of your various positions with the company, are you familiar with the operations as carried on in the various locations in Alaska Pacific Salmon Company during the years 1937, 1938, and 1939? A. Yes, sir.

Q. Did the Company during the year 1937 carry out an operation at Drier Bay? A. Yes, sir.

Q. And where is Drier Bay located?

A. Drier Bay is on Knight Island in Prince William Sound, approximately 75 miles west of Cordova.

Q. What was the operation that was carried on at Drier Bay in the year 1937?

A. A fishing operation only.

Q. That is, you mean you didn't operate a cannery?

A. We did not operate the cannery or pack fish.

Q. Well, what facilities were actually operated during that [31] year?

A. Five floating traps. The gear were made up, traps put in, and fished, and the fish hauled to another cannery for packing.

Q. Now, the company, as a matter of fact, owned the cannery at Drier Bay, did it not?

(Testimony of Fred W. Tegtmeier.)

A. Yes, sir.

Q. But in the year 1937, it did not operate the cannery?

A. That is right.

Q. It did operate the traps to catch the fish?

A. Yes, sir.

Q. And the fish caught in those traps were under some arrangement packed at a different cannery?

A. Yes, sir.

Q. So that the men employed at Drier Bay in 1937 were all employed in some capacity or other in relation to the operation of the traps at distinguished from the cannery?

A. With the exception of a watchman.

Q. By that, you mean a watchman at the cannery?

A. A watchman for the cannery.

Q. How many men were employed at Drier Bay in 1937?

A. Approximately 30.

Q. And how were they housed and fed there?

A. At the cannery.

Q. And by whom?

A. Such time as they were on shore.

Q. How is that?

A. Such time as they were on shore.

Q. And by whom?

A. By the company

[32]

Q. That is, the cannery building itself was used as a rooming house while they were there?

A. The bunkhouse and the mess house.

Q. And while they were not on there, how were they housed or fed?

(Testimony of Fred W. Tegtmeier.)

A. They were on the boats or on the gear scow and fed by the company.

Q. In either event, the sustenance and shelter were furnished by the company? A. Yes, sir.

Q. Were there any means of housing or feeding these men otherwise than were done by the company? A. No, sir.

Q. The season at Drier Bay in 1937 extended between what dates, approximately?

A. Approximately from April 1st to September 1st.

Q. What were the reasons which required the men to be housed and fed by the company?

A. No other accommodations for them nearer than Cordova, and I do not know whether there were accommodations even at Cordova for them.

Q. Well, Cordova is how far distant?

A. 70 miles distant.

Q. Would it be practical to have the men live at Cordova and work on these traps?

A. No, sir.

Q. Were the operations on the traps from day to day regular or irregular? A. Irregular.

Q. Did that factor have any relation to the necessity of [33] having the men on the job available at all times? A. Yes, sir.

Q. Now, you did not operate at all at Drier Bay in 1938 or 1939? A. No, sir.

Q. You had an operation at Sand Point in all three years, did you not? A. Yes, sir.

Q. And would the operation as carried on in

(Testimony of Fred W. Tegtmeyer.)

the year 1937 be substantially identical with that carried on in the two succeeding years?

A. Yes, sir.

Q. Sand Point is located where?

A. About 350 miles or maybe 300 miles east of Dutch Harbor in the Shumagin Islands.

Q. Now, that is very close to the Shumagin or Squaw Harbor Plant of the Pacific American Fisheries, is it not?

A. About 10 miles.

Q. Would the operation carried on by the Alaska Pacific Salmon Company at the Sand Point plant be substantially identical with the Pacific American Fisheries' operations at King Cove and Shumagin as described by Mr. Mowry?

A. I think so, yes, sir.

Q. And would that be true as to the housing and feeding of the men?

A. Yes, sir.

Q. You have already stated about the irregularity of the daily operation?

A. Yes.

Q. Does that apply equally? [34]

A. Yes, sir.

Q. And did you state what the season is at Sand Point?

A. The season at Sand Point is from the first of April or the middle of August or the first of September. The first of September is a better date.

Q. About what number of men are normally employed at Sand Point?

A. About 180.

Q. And the normal pack at Sand Point is how many cases?

A. About 125,000.

(Testimony of Fred W. Tegtmeyer.)

Q. That would be probably a little more than what would be regarded as an average sized cannery, wouldn't it?

A. It is a little over average, yes.

Q. What is the reason for the company supplying board and lodging at Sand Point?

A. Because there are no other accommodations available for the employees.

Q. Would it be practical for the operation to be carried on at all if the board and lodging were not supplied by the company itself?

A. No, sir.

Q. For its convenience?

A. No, sir; it could not.

Q. At Sand Point, do you furnish any medical aid?

A. There is no medical aid at the cannery, but we have a joint agreement with the Pacific American Fisheries to call on their doctor at Squaw Harbor in the Shumagin Islands.

Q. That is ten miles distant?

A. About ten miles distant. [35]

The Court: Speaking of that necessity of the company furnishing food and lodging, would it have been humanly possible for the men themselves to furnish their own food and lodgings?

The Witness: No, sir; there is no other lodging available there than the company bunkhouse, and as far as the food is concerned, we do not maintain a store there for sale purposes. Neither could the men, due to the irregular work and the number of hours put in, prepare their own meals. The ma-

(Testimony of Fred W. Tegtmeyer.)

jority of the time during the fishing season, we limit the meal hours to 30 minutes.

The Court: Would it be possible for them to carry food supplies with them?

The Witness: For their meals?

The Court: Yes.

The Witness: If they had a way to prepare it, or were able to prepare the food before they went to work in the morning, they might carry a noon meal with them, although it is rather hard to carry an evening meal, and possibly a midnight meal.

The Court: If the company arranged to use its own facilities for supplying lodging and food to the men, is it possible that the company might by some arrangement let the workmen have the use of the premises, to prepare their own meals in their own way—arrange for the preparation there?

The Witness: I would not be in a position to speak on that.

The Court: You may inquire.

Q. (Mr. Carey, continuing) Well, would it be an operating—[36] as an operating matter, would it be practical for the individual man to take care of his other work and look after preparing his own meals?

Mr. Witness: We will object to that as leading.

The Court: Objection overruled.

A. I would not consider that it was practical, no.

Q. (Mr. Carey, continuing) You have a staff of cooks and waiters there to run the mess house, I presume?

A. Yes, sir.

(Testimony of Fred W. Tegtmeyer.)

Q. Well, take at Sand Point, for instance—in the operation of the mess house during the season, how many cooks and waiters do you have who are assigned exclusively to that work?

A. I cannot say. I have not followed the situation close enough to know.

The Court: Is some of this lodging furnished on board a floating vessel?

The Witness: Yes.

The Court: Could it have been possible to float it in such vessels at each of the canneries by the men themselves, if they had wished to have done so?

The Witness: No. Those gear scows are dependent upon the cannery tenders, and many times they stay out at the traps for several days at a time.

Q. (Mr. Carey, continuing) I do not know whether I understood the answer you made to his Honor. The men who work on the boats, they ordinarily eat and sleep on the boat on which they are employed?

A. Yes, sir.

Q. The men who work on the land, they eat and sleep in the [37] mess house and bunkhouse?

A. Yes, sir.

Q. On the land?

A. Yes, sir. Well, as I understood his Honor's question, the court had in mind whether these men could come ashore and prepare their own meals, is that correct?

The Court: No. I had in mind whether every workman of each cannery might not by the company be supplied with lodging on board some floating

(Testimony of Fred W. Tegtmeyer.)

equipment instead of on shore. Was there any such general lodging accommodations supplied to the general workmen in the cannery—such lodging supplied to the general workmen by the company on floating equipment as distinguished from those on land?

The Witness: No. All land workmen were supplied on land.

The Court: What about those floating cannery operations that we have heard about?

Mr. Carey: Well, we haven't any of those.

The Court: Isn't all the lodging supplied the people connected with the enterprise furnished on board floating equipment?

The Witness: I cannot say. We have no floating canneries, and I am not familiar with their system of operation.

The Court: You may inquire further.

Q. (Mr. Carey, continuing) Now, the four remaining canneries operated by the Alaska Pacific Salmon Company were all located in Southeastern Alaska? A. Yes, sir.

Q. And all four—that is, Kake, Ketchikan, Port Althorp [38] and Rose Inlet, were all operated each of the three years of 1937, 1938 and 1939?

A. Yes, sir.

Q. Taking the Kake cannery first, where is the Kake cannery located?

A. About 60 miles west of Petersburg.

Q. And is Petersburg the nearest established settlement? A. Yes, sir.

(Testimony of Fred W. Tegtmeyer.)

Q. The operation at Kake is carried on by the Alaska Pacific Salmon Company in all essential particulars similar to the southeastern Alaska operations as described by Mr. Mowry, is it not?

A. Yes, sir.

Q. Like Kasaan? A. Yes, sir.

Q. And Petersburg? A. Yes, sir.

Q. The fish are caught in the same way, and the cannery operated in the same way, and sustenance and lodging furnished in the same way?

A. Yes.

Q. And for the same reasons? A. Yes, sir.

The Court: At this point, we will take in this case the noon recess.

Mr. Carey: If your Honor will give me half a minute, I will dispose of two canneries.

The Court: That is fine.

Q. (Mr. Carey, continuing) Now, what you said about Kake would apply equally to Port Althorp and Rose Inlet? [39] A. Yes, sir.

Q. Port Althorp is located how far distant from the nearest settlement?

A. Oh, approximately 120 miles west of Juneau, about 70 miles north of Sitka.

A. And Rose Inlet?

A. About 60 miles west of Ketchikan.

Q. In the same general vicinity as Kake?

A. Yes, sir. No, Kake is west of Petersburg, and Rose Inlet is west of Ketchikan.

Mr. Carey: Pardon me. That is all.

The Court: Those connected with this case are excused until two o'clock this afternoon.

(Whereupon, an adjournment was taken at 12:00 noon July 8, 1942, to 2:00 p.m. July 8, 1942.) [40]

2:00 p.m.

July 8, 1942

The hearing was resumed, pursuant to the taking of noon recess, and the following proceedings were had:

(All parties present as heretofore noted.)

FRED W. TEGTMEYER,

called as a witness on behalf of the Plaintiffs, resumed the stand for further examination.

The Court: You may proceed.

Direct Examination

(continued)

By Mr. Carey:

Q. Mr. Tegtmeyer, during the morning, we covered all of the operations of the Alaska Pacific Salmon Company except that at Ketchikan. Your company has a cannery at Ketchikan which was operated in the three years of 1937, 1938 and 1939, is that right? A. Yes, sir.

Q. What is the fact as to whether or not the operation of your cannery at Ketchikan is substantially the same as the PAF cannery at Petersburg, as described by Mr. Mowry?

(Testimony of Fred W. Tegtmeier.)

A. Practically the same condition.

Q. And you house the men, feed them, and handle them in substantially the same way, and for the same reason?

A. Yes, sir.

Q. Now, in all these canneries that you have described, operated by your company, the Alaska Pacific, are they all canneries located on land, or are any of them floating canneries? [41]

A. All of them are on land.

Mr. Carey: You may cross examine.

Cross Examination

By Mr. Winter:

Q. Mr. Tegtmeier, did you have a written contract for each of those years?

A. I don't know. I do not have anything to do with the labor contracts in our department.

Q. You do not know then the basis on which the men were paid?

A. No, sir.

Q. And all that you presume to tell is about the operations—how the operations were conducted up there?

A. Yes, sir.

Q. Were you ever present at the Ketchikan cannery?

A. I was at the Ketchikan cannery——

Q. (Interrupting) During 1937, 1938 and 1939?

A. In 1939, yes, sir.

Q. You were not up there before?

A. Not in those other two years.

Q. In 1939, how many men lived away from the bunkhouse?

(Testimony of Fred W. Tegtmeyer.)

A. I don't know. I was only in there for about five or six hours north and southbound.

Q. Well, don't you know as a fact that there were men—natives of Ketchikan who worked at the cannery during the canning season?

A. I would not swear to that. I was under the impression——

Q. (Interrupting) Did you make any investigation——

Mr. Carey: (Interrupting) Just let him answer the question. [42]

Mr. Winter: All right.

A. I was under the impression that there were, from looking at the payrolls.

Q. And what allowance would be made those men, according to the payroll records, when they did not take board and room?

A. As I see it, there is no comparison between the situations. The parties that did not remain at the cannery, that lived at home, were a bunch of what we call "locals" that were paid by the hour.

Q. That were paid by the hour?

A. Yes, when we called them to work. The regular cannery employees in the majority of cases were on a monthly contract.

Q. All right. Now, with regard to the net setters. What allowance would you make to the net setters? Do the books show what allowance was made when the company did not furnish room and board? Was it \$1.25 a day during 1939?

A. I don't know.

(Testimony of Fred W. Tegtmeier.)

Q. Well, there was some allowance for the net setters when the company did not furnish the room and board, isn't that right?

A. Not that I know of.

Q. You don't know of that?

A. No, sir. Personally, I do not know of any of the regular employees that stayed there for the year that boarded at home.

Q. Are you familiar with the basic pay scale that was in effect during 1939?

A. Well, generally, to the extent that the regular employees [43] of the Fishermen's and the other unions were paid by the month.

Q. They were paid by the month, were they?

A. Yes, sir.

The Court: I think you should have in mind what he said at the outset of his cross examination, that he was familiar primarily with the operations rather than with the union contract.

Mr. Winter: I see.

Q. (Mr. Winter, continuing) And I take it that if you were not up in Ketchikan until 1939, that you do not know anything about the relations up there in 1937 and 1938 except from hearsay?

A. Except from hearsay, and going over the records.

Q. And where else were you in 1939?

A. I was at Kake for about 2 years.

Q. About 2 years at Kake? A. Yes, sir.

Q. And did you go out on any of the boats where

(Testimony of Fred W. Tegtmeyer.)

they were fishing, to see how they got their meals or anything on the boats?

A. I had no meals on the boats, no. No, I was not at Kake on any of the fishing boats.

Q. Where else were you?

A. I was at Port Althorp for 10 days to 2 weeks—probably about 10 days.

Q. Did you make a swing around all of the canneries? Was that your purpose?

A. No. The bookkeeper at Port Althorp was taken sick, and I went up to see that the assistant bookkeeper, who was a [44] new man, had things in line.

Q. Were you at Drier Bay? A. No, sir.

Q. Then you do not know whether any man lived offshore or away from the bunkhouses there, do you? A. No, sir.

Q. And how about at Kake?

A. I would say that I don't know. I know that the men lived on boats at that time, and on the gear scow, because I saw the gear scow coming in with the men, and the boats coming in with the men at Kake, Port Althorp and Ketchikan.

Q. You do not know whether any other men were living there at Kake away from the cannery?

A. No.

Q. Nor at Rose Inlet?

A. I was not to Rose Inlet in those three years.

Q. You never were at Rose Inlet in those three years? A. No, sir.

(Testimony of Fred W. Tegtmeier.)

Q. Did you say, or do you say, that you were at Sand Point?

A. No, sir; I have never been to Sand Point.

Q. So therefore what you have been testifying to is just what you heard, and from the books?

A. It is hearsay, and from the books for those three years. My knowledge of those distances—my knowledge of the distances of the canneries from the towns is based on the fact that I have been to all of the canneries in previous years except Sand Point.

The Court: That was a part of your work, was it, to look the books over and the facts reflected by the books?

The Witness: Yes. I was travelling auditor all the [45] time.

Mr. Winter: We move to strike this witness' testimony on the ground that it is based on hearsay.

The Court: I will hear you on that.

Mr. Winter: Now, the books are hearsay so far as this witness is concerned. He didn't go up there to prepare the books. All we have here is a geography lesson, it seems to me.

The Court: It seems to me that possibly some of this objection may have been noted earlier in the proceedings and since the answer was made and he said that the source of his information was not only hearsay, but the facts disclosed by those books which he had the duty as traveling auditor to examine, that at this stage your objection should be overruled.

(Testimony of Fred W. Tegtmeyer.)

Mr. Winter: I will withdraw the objection and interrogate him a little further on that.

The Court: Very well.

Q. (Mr. Winter, continuing) When you say that you obtained these facts from the books, you mean that they showed considerable expenditures for board and room for the employees, is that what you base your testimony on?

A. We have an account in the books for the operation of the mess house.

Q. Then you are basing your testimony entirely upon the cost or charges on the books for the mess house?

A. What testimony have you in mind?

Q. Well, the testimony that it was necessary for the men to live there.

A. No, that is not based on the books. That is based on my [46] own knowledge in being a Kake for three years—for three summers, and at Ketchikan for six or eight summers, and visiting the others.

Q. That was prior to 1937, was it not?

A. That was prior to 1937, yes.

Q. And you do not know what the conditions were subsequent to 1937 except as shown by the charges on the books?

A. Except as shown by the charges on the books and conversations had with the various superintendents, bookkeepers and employees.

Q. You do not know what percentage of the men actually lived away from the bunkhouse, do you?

(Testimony of Fred W. Tegtmeier.)

A. No, sir.

Q. Or what percentage of them furnished their own food when they were on board acting, for instance, as set netters?

A. I found nothing in the record to indicate that any of them furnished their own food. In all the employees' accounts for payment, I found nothing to indicate that there was any food charged for at any time.

Q. Then you say that there was nothing on the books to show that the set netters were paid \$1.25 per day when there were no provisions on board, or board furnished by the Company—that it never happened in any of your operations?

A. I said that I didn't notice it, or I didn't see it on the books.

Q. Well, how would it be shown if it were on the books?

A. It would be shown as a deduction.

Q. Or would it be shown just as a charge for the fish?

A. I do not know how it would reflect in the charge for the fish. [47] There may have been various rates paid for the fish, as there always is, but if there was a board allowance, the men would have received credit for it in addition to the fish, as far as I can see, and if there was a deduction for groceries, that would have shown as a deduction for the employees. There are approximately 1,000 or more employees, and naturally I cannot audit and

(Testimony of Fred W. Tegtmeyer.)

check over every item of deduction for all of the employees.

Q. Well, what is shown on the books of your corporation under the board and room allowance to the fishermen?

Mr. Carey: Gill netters, you mean?

Mr. Winter: I mean any of the fishermen; any of the cannery workers.

A. Nothing that I know of.

Q. What do you consider as a reasonable board allowance?

Mr. Carey: I object to that as immaterial and irrelevant.

Mr. Winter: I will amend that.

Q. (Mr. Winter) Board and room allowance.

Mr. Carey: There is not any question here involved—no contest about the reasonableness of the dollar a day that is involved here.

The Court: The purpose of it is that you are seeking to show what is a reasonable amount as it appears in the books?

Mr. Winter: Yes, in the books.

The Court: Deductions in similar instances?

Mr. Winter: Yes, your Honor.

The Court: Objection overruled. The witness may answer.

A. Well, that is a little hard to say. It varies in the [48] different years, and at the different canneries so far as the cost of meals is concerned. As far as the lodging is concerned, there is practically no expense except depreciation and a little fuel, and

(Testimony of Fred W. Tegtmeier.)

so forth, that is not definitely allocated to the bunk-house but that is a part of the camp operation. But I would say that a dollar in those three years—in those three years, probably a dollar to a dollar and ten cents for meals exclusive of bed or room would be a reasonable allowance. They are furnished a room, cot and mattress, and they furnish their own bedding.

Q. (Mr. Winter, continuing) Then in addition to the basic pay, as I understand from your testimony, your company furnished to all of the cannery workers without exception, lodging and board for those three years?

The Court: He said exclusive of bedding—lodging exclusive of bedding.

Mr. Winter: Yes, lodging exclusive of bedding.

The Court: Which would be sheets and blankets.

The Witness: Sheets, blankets, pillows and so forth. We furnished the mattress and springs—the spring, mattress and the room.

The Court: And anything else that goes on the bed the workman has to supply himself.

The Witness: Yes, sir; unless it is a mattress cover which we put on for cleanliness. And in some cases,—well, I would not say just what we do furnish in the last three years as far as soap and some of those features go, because I do not know what the policy is under the labor agreements.

The Court: Is there anything else? [49]

Mr. Winter: I think that is all.

Mr. Carey: That is all.

(Testimony of Fred W. Tegtmeyer.)

The Court: You may step down.

(Witness excused.)

Mr. Carey: Mr. Mowry, will you please resume the stand again?

RUSSELL MOWRY

recalled as a witness on behalf of the Plaintiffs, having previously been duly sworn, was examined and further testified as follows:

The Court: You have already been sworn.

Direct Examination

By Mr. Carey:

Q. Mr. Mowry, I want to ask you one additional question. These nine canneries that were operated during these years by the Pacific American Fisheries, were they all land canneries, or were some of them what is known as floating canneries?

A. No, they are all land canneries.

Q. You operated no floating canneries at any time?

A. No floating canneries.

Mr. Carey: That is all. You may cross examine.

Cross Examination

By Mr. Winter:

Q. Mr. Mowry, are you familiar with the operations in all of the canneries up there personally?

A. You mean personally if I have ever visited them?

Q. Yes. [50]

(Testimony of Russell Mowry.)

A. No, I have never visited them.

Q. And all the testimony that you are giving as to how they are operated, I take it, is from the same basis—from the books, as to what the charges show?

A. Not necessarily. You cannot be comptroller of a company without knowing the operating conditions.

Q. Well, where did you get your information, from what someone told you, or from the books?

A. Well, you have to get it from the books. You assimilate the knowledge. I have been in this for twelve years.

Q. You do not know of your own knowledge how many men in any of those canneries lived at home, do you?

A. I certainly know that they did not live at home if there were no homes there.

Q. Well, in Ketchikan there are homes, aren't there?

A. We do not have any operations in Ketchikan.

Q. Well, you have operations near Ketchikan?

A. We have one 30 miles from Ketchikan.

Q. At Kasaan?

A. Yes, which is 30 miles from Ketchikan.

Q. Do you know of anyone who went up there on his own boat—any man that went up there—any natives?

A. If any man went up on his own boat, I would know about it.

Q. How would you know about it, from the books?

(Testimony of Russell Mowry.)

A. No. I would know about it because we have always taken care of the transportation of the men north and southbound.

Q. Did you have anything to do with the contracts of employment which were made with the Union for all the men?

A. I assisted somewhat.

Q. You assisted? [51] A. Yes, sir.

Q. Did you bring any of those contracts with you? A. No, sir.

Q. Do you know what the contract was for the employment of those men, as to what wages and remuneration they were to receive?

A. I certainly do. I read the contracts and had the contracts filed, and I paid the men off. I read the contracts and had them filed.

Q. You read them and had them on file?

A. Yes, sir.

Q. You know, as a matter of fact, Mr. Mowry, that in the contract, allowance was made for set netters to be paid \$1.25 per day in addition to their regular compensation where no board and room were furnished, don't you?

Mr. Carey: Just a minute. Now, I object to that upon the same ground that counsel himself objected, that the contract is the best evidence.

Mr. Winter: If you won't produce them, we will.

Mr. Carey: I object to any such insinuation as that, and move to strike that from the record.

The Court: It may be stricken. Please refrain from such remarks, counsel.

(Testimony of Russell Mowry.)

Mr. Carey: Now, on this question of these contracts, your Honor, although this case was pending for a year, no demand was ever made upon us to produce any of these contracts. I did not consider the actual production of the contracts necessary for our case. However, in view of what transpired this morning, I made such inquiries as I could. I found that the contracts for 1937, 1938 and 1939 [52] are available—at least copies of them, so far as the Alaska Pacific Salmon Company is concerned, and I have those office copies here. So far as the contracts for the Pacific American Fisheries are concerned, they are in Bellingham, and I have not been able to get them here.

I am not relying upon those contracts as part of my case. I do not propose to introduce them. The ones that I have been able to get during the noon hour, however, are here, and they are available to counsel if he wants to examine them. If counsel or the court think that the PAF contracts are necessary, your Honor, I will have to get them from Bellingham when I can.

Mr. Winter: I will have this marked.

The Court: That will be Defendant's A-1 for identification.

(Whereupon, contract between Pacific American Fisheries, Inc. and Alaska Fishermen's Union at Nornek for the 1939 season was marked Defendant's Exhibit A-1 for identification.)

The Court: Have you seen this, Mr. Carey?

(Testimony of Russell Mowry.)

Mr. Carey: No, I have not. I would like to see it.

The Court: Plaintiff's counsel may see it. If there are any others of a like nature, Mr. Winter, and if it is agreeable to your convenience——

Mr. Winter (Interrupting): We would like, in view of counsel's offer, to have him produce the 1937, 1938 and 1939 contracts which he says are available.

Mr. Carey: Of which company, now?

Mr. Winter: Of either company.

Mr. Carey: What is that?

Mr. Winter: Of either company. [53]

Mr. Carey: Well, you did not listen to what I said, apparently, Mr. Winter. I said the Alaska Pacific contracts are available here now.

The Court: For those years that he mentioned?

Mr. Carey: For those years that he mentioned. The Pacific American Fisheries contracts are not here.

The Court: Will you hand them to the clerk? As I understand it, Mr. Carey is going to produce those that he does have.

Mr. Carey: Let me dispose of this first.

The Court: I gave you the opportunity to look at that contract which is Defendant's Exhibit A-1 for identification.

Mr. Carey: I have no objection to this.

The Court: Do you wish to ask the witness concerning this for identification, Mr. Winter, so that the record will show what it is?

(Testimony of Russell Mowry.)

Mr. Winter: Yes, your Honor.

The Court: You may proceed.

Q. (Mr. Winter, continuing): Are you familiar with Mr. Archie W. Shiels' signature?

A. I certainly am.

Q. Showing you what has been marked for identification as Defendant's Exhibit A-1, I will ask you to state whether or not—I will ask you to state whose signature appears on that document?

A. That is Mr. Shiels' signature, president of the Pacific American Fisheries.

Q. Will you examine that document and state to the Court what it is? [54]

Mr. Carey: I think that the court can see what it is, just as well as he can.

The Court: That objection will be sustained.

Mr. Carey: We do not question that it is a contract with the Pacific American Fisheries.

Mr. Winter: Well, we will offer it in evidence, if the Court please.

The Court: Any objection?

Mr. Carey: No objection.

The Court: Defendant's Exhibit A-1 is admitted.

(Whereupon, contract between Pacific American Fisheries, Inc. and Alaska Fishermen's Union covering men employed at Nornek, 1939 season, previously identified as Defendant's Exhibit A-1, was admitted in evidence as Defendant's Exhibit A-1.)

The Court: Now, if Mr. Carey has those other

(Testimony of Russell Mowry.)

contracts for the company that he mentioned, for the years that were mentioned by Mr. Winter, he may have the clerk have them temporarily.

Mr. Carey: Yes, I will give them to the clerk, but may I be permitted to ask a question about this contract and we can clean that up?

The Court: You may do that first, if you like.

Mr. Carey: That will be more orderly.

The Court: After which Mr. Winter may proceed further with his examination of this witness.

Mr. Carey: Were you through with this witness?

Mr. Winter: No, I am not through with him yet.

Mr. Carey: Oh, I see.

The Court: You may reserve your further inquiry, Mr. Carey, and you may proceed, Mr. Winter.

[55]

Q. (Mr. Winter): I take it that this is the contract that your company had with the seamen and fishermen and trapmen and beach men during 1939, covering those men or those employees that sailed on the vessel Clevedon, is that right?

A. That is not altogether right. This is a contract with the Alaska Fishermen's Union, as I see it, for Bristol Bay only.

Q. Just for Bristol Bay?

A. Just as I saw it, when I looked at it, and it covered one voyage of the Clevedon.

Q. You may look at it. What I want to know is this, were similar contracts executed between your

(Testimony of Russell Mowry.)

company and the Fishermen's Union with respect to the other operations during that year?

A. Yes, but they were not on this form.

Q. Well, do you know——

A. (Interrupting): This is a very special form of contract.

Q. For Bristol Bay?

A. For Bristol Bay, and for the ship that the men traveled on.

Q. Now, can you state,—in Bristol Bay, as you know from the records, there were certain net setters for whom provision was made for board and room.

A. To my knowledge, we never had a net setter.

Q. Well, you did enter into this contract?

A. Yes, sir.

Q. And if there were any net setters, then, of course, under the contract, they were to be allowed a provision of \$1.25 per day—— [56]

Mr. Carey: (Interrupting) I object to that as a question based purely upon a false hypothesis. The witness said that there weren't any net setters. Of course, this is a uniform contract made with the Alaska Fishermen's Union designed to cover net setters, if there are any such men, and, of course, if there are no such men, the contract is not applicable.

The Court: I think the Court should sustain that objection.

Mr. Winter: I submit that that is correct, your Honor.

Q. (Mr. Winter, continuing) It was your un-

(Testimony of Russell Mowry.)

derstanding, then, under this contract, that you were going to furnish board and room to all of the employees of the company, wasn't it?

Mr. Carey: I object to that.

Mr. Winter: I am asking what his understanding was.

Mr. Carey: His understanding may be right, or it may be wrong. It doesn't make any difference. The contract is here. The question is, what does the contract provide?

The Court: That objection is sustained.

Q. (Mr. Winter) Well, did you negotiate for the corporation with the union in entering into the contracts at any time?

A. To a certain extent, yes.

Q. And you read this contract, did you not? You did not sign it, however, did you? A. No.

Q. Were you present when it was signed? [57]

A. No.

Q. What? A. No.

Q. I think that I asked you, you had similar contracts—contracts on different forms, however,—for other years?

Mr. Carey: Just a minute, now. I object to that.

Mr. Winter: Well, I am just asking him if he had them.

Mr. Carey: Your Honor, I am objecting on the ground that it is immaterial whether he did or not. We have agreed to furnish any contracts that counsel calls for as soon as we can get them, and it is

(Testimony of Russell Mowry.)

improper to ask about some other contract based upon whether it is or it is not similar to this. The best proof is the contract itself.

The Court: That particular objection, the Court is going to overrule. If he knows the answer to that question, he can give it. The only objection is that you haven't specified the years.

Mr. Winter: I will limit it to the years 1937, 1938 and 1939—the years involved.

The Court: With that limitation, the objection is overruled.

Mr. Carey: The question asked was, did he have similar contracts, and then he said "Contracts on different forms". Well, if they are similar, they must be on the same form. If they are on different forms, they are not the same contract.

The Court: I think that this witness is an intelligent man, and I think that he understands the question, if he [58] has sufficient knowledge to answer. So he may answer the question. If he cannot, he may say so.

A. We had contracts on the same form. This contract is for Nornek. We had the same form of contract for Naknek and Nushagek, and contracts on other forms for other canneries.

Q. Can you produce a contract on another form which is different from this one?

Mr. Carey: Well, I agreed to do so.

The Court: Your promise about these includes that?

(Testimony of Russell Mowry.)

Mr. Carey: Why, surely. Any contract that counsell wants, if he will let us know what he wants, we will get it.

The Court: Very well. Your question is proper, and I think that the answer likewise is proper.

Q. (Mr. Winter) You say that you have other contracts?

The Court: Mr. Carey, the counsel, said that he would get them.

Mr. Winter: Very well.

Q. (Mr. Winter, continuing) Did the other operators have similar contracts to this contract, Government's Exhibit A-1?

Mr. Carey: I object to that.

Q. (Mr. Winter) If you know.

The Court: What other operators?

Mr. Winter: I mean other canneries.

Mr. Carey: I object to that as immaterial.

Mr. Winter: If he knows.

The Court: Sustained. If you wish to confine it to someone a party to this suit, the Court may have a [59] different view of it.

Q. (Mr. Winter, continuing) Did the Alaska Pacific Salmon Company have a similar contract to this, if you know?

Mr. Carey: Just a minute. I object to that. This witness is not produced as a witness on behalf of the Alaska Pacific Salmon Company.

The Court: The two cases, I understand, are consolidated for trial, and if he knows the answer

(Testimony of Russell Mowry.)

to the question, I do not see why it should not be competent for him to state it.

Mr. Carey: Well, he was not with the Alaska Pacific Salmon Company in 1937, 1938 and 1939.

The Court: Well, he may possibly have the requisite knowledge, even though he was not. Objection overruled.

A. The Alaska Pacific Salmon Company did not have a contract on that form.

Q. (Mr. Winter) Did they have a contract on the form to which you just referred to in your previous answer? A. They probably did.

Q. Those contracts with the Alaska Fishermen's Union would apply to the whole industry in a particular area——

Mr. Carey: (Interrupting) I object to that.

Q. (Continuing) ——and were on forms of the same type, were they not?

Mr. Carey: I object to that as immaterial. Now, as I said before, we have never had any demand made upon us for the production of anything.

Mr. Winter: May we see the contract?

The Court: Just let counsel finish his statement, Mr. Winter. [60]

Mr. Winter: Very well.

Mr. Carey: But we are willing to produce anything that counsel wants produced, even at this belated date, if he will tell us what it is that he wants.

Mr. Winter: Well, we would like to see the contracts, with the Alaska Pacific Salmon Company

(Testimony of Russell Mowry.)

which you say you are willing to produce, for the years 1937, 1938 and 1939.

Mr. Carey: I will produce them, and will do so in a moment, but I object to this witness being examined about contracts of a different company with which he had nothing to do in those years.

The Court: Well, as I understand the last question, it had to do with the contract prevalent in the industry, which might include employers other than those two who are involved in this proceeding—this lawsuit. In so far as the question relates to other employers in the industry, other than these two involved in this lawsuit, the objection is sustained. It is only with reference to these two employers that we are concerned. It is only what the contracts were of these two that the Court thinks are material.

Mr. Winter: These case were consolidated for trial, because they were based on the same facts and the same statements.

The Court: I believe that that statement is not necessary. The Court's last statement ought to take care of it.

Mr. Carey: I now have, and tender for inspection of counsel, the following 1937 labor agreements of the [61] Alaska Pacific Salmon Company:

First—a copy of a contract between the Alaska Pacific Salmon Company and the Alaska Fishermen's Union, covering southeastern Alaskan canneries;

Two—a copy of a contract between the Alaska

(Testimony of Russell Mowry.)

Pacific Salmon Company and the Alaska Fishermen's Union, covering what are known as the westward canneries;

Third—a copy of a contract between the Alaska Pacific Salmon Company, and in this particular copy, your Honor, the name of the Company—the blank is not filled in, and the Prince Williams Sound Fishermen's Union, covering certain employees of the Prince Williams Sound, Alaska, canneries.

Four—a copy of a contract dated April 7, 1937, between Alaska Pacific Salmon Company and the American Radio Telegrapher's Association.

The Court: For all operations, no matter in what locality in Alaska?

Mr. Carey: I assume so, your Honor.

The next is a copy of a contract, again the name of the company is blank, and I will mark it in the corner, "Alaska Pacific", between the Alaska Pacific Salmon Company and the United Brotherhood of Carpenters & Joiners, Local #1184.

The Court: And that also covers all Alaska localities?

Mr. Carey: I assume that that would cover all workmen of that particular Union, the Carpenters & Joiners.

The next is a copy of a contract, and the name again is blank, and I am marking it "Alaska Pacific", with [62] the Copper River and Prince William Sound Fishermen's Union, the contract being headed, "Company's—Fishermen's Union."

And the next and last of the 1937 contracts is a

(Testimony of Russell Mowry.)

copy of one between the Alaska Pacific and again the name of the company is absent, and I am marking it, and the Cannery Workers' and Farm Laborers' Union, Local 18257. That I think is what is ordinarily called the Filipino contract.

Now, I tender for the inspection of counsel the following copies of the 1938 contracts of the Alaska Pacific Salmon Company.

The Court: Do they coincide in that year with the ones that you have just mentioned for the previous year?

Mr. Carey: I cannot answer that, your Honor, because I have not had an opportunity to compare them, and in these instances, as before, where the name of the company is blank in the contract, I will write the name in the corner.

First is the agreement dated April 27, 1938 entitled, "Agreement for Southeastern Alaska", between the Alaska Pacific Salmon Company and the Alaska Fishermen's Union.

The next is an agreement between the Alaska Pacific Salmon Company and the Alaska Fishermen's Union, dated April 27, 1938, covering westward canneries.

The next is a copy of a contract dated April 29, 1938, with the Machinists' Locals 79 and 239 of the International Association of Machinists of Seattle, the contract being entitled, "Machinists' Agreement Locals #79 and #239." [63]

The next is a contract between the Alaska Pacific Salmon Company and the Seattle District

(Testimony of Russell Mowry.)

Council of Carpenters, the contract bearing date of April 30, 1938, and entitled "Carpenters' Agreement, Local 1184."

The next is a contract with the American Radio Telegraphers' Association, dated May 28, 1938.

The next and last is a contract between the Alaska Pacific Salmon Company and the Cannery Workers' and Farm Laborers' Union, Local #7, United Cannery, Agricultural, Packing and Allied Workers of America, C.I.O. The date of the contract is May 20, 1938, and the contract is entitled, "Agreement with Cannery Workers' and Farm Laborers' Union # 7, United Cannery, Agricultural, Packing and Allied Workers of America." And that concludes the 1938 contracts.

I now tender for the inspection of counsel the following copies of 1939 contracts of the Alaska Pacific Salmon Company. The first is a contract dated May 19, 1939 between this company and the United Cannery, Agricultural, Packing and Allied Workers of America, C.I.O. That date is May 19, 1939.

The Court: This is for what part of Alaska—does it state the part of Alaska to which it applies?

Mr. Carey: No, I think not.

The Court: I guess I had better get you to read the classifications of work that are covered.

Mr. Carey: This is a contract with the United Cannery, Agricultural, Packing and Allied Workers of America. That I think is what is commonly

(Testimony of Russell Mowry.)

known as the Filipino contract, and I think it is uniform throughout the territory. [64]

The Court: Do you think that the two contracts before this, covering the cannery workers, are the same thing as that?

Mr. Carey: I cannot go any further than this. I think they are probably substantially the same.

The Court: And cover Filipino workmen, you believe?

Mr. Carey: That is my understanding.

The Court: It may be a different union but covering the same type of workmen?

Mr. Carey: That is what I understand. But, as I say, I have not compared the contracts, so I cannot unqualifiedly state the differences, if there are any.

The next is a contract between the Alaska Pacific Salmon Company, dated April 27, 1939 and the Alaska Fishermen's Union, entitled "Agreement for Southeastern Alaska."

The next is a contract between the Alaska Pacific and the International Association of Machinists, Machinists' Local 79. The contract is dated May 1, 1939, and it is entitled "Machinists' Agreement, Local #79."

The next is a contract between the Alaska Pacific Salmon Company and the American Communications Association. The date of the contract is May 5, 1939. I assume that that is a new name for the radio operators. Glancing at the top of the contract it seems to be that.

The next is a contract between the Alaska Pacific

(Testimony of Russell Mowry.)

Salmon Company and the Seattle District Council of Carpenters, A F of L, Local 1184. The date of the contract is May 6, 1939, and the contract is entitled "Carpenters' Agreement, Local #1184."

[65] The next is a contract between the Alaska Pacific Salmon Company and the Alaska Fishermen's Union, dated April 20, 1939, and entitled, "Agreement for Westward Canneries."

These are all the contracts that I have been handed, and it has been reported to me that they are a complete set.

Now, I understand from Mr. Tegtmeyer that that is the only complete set of these contracts—at least for two of the years—that are available, and to the extent that they are not needed in this case, I would like to withdraw them, and to the extent that they are material here, we would like the privilege of either later substituting copies or the understanding that when they are no longer needed, they can be withdrawn.

Mr. Winter: I take it by your statement, Mr. Carey—or will you concede that this company, or both companies have similar contracts in the area in which they fish?

Mr. Carey: I am sorry, Mr. Winter, but I do not find myself in any position to make such a stipulation. As I say, I was not given any notice in advance, and if counsel desired these contracts, I would have been glad to produce them, and compared them, and made any stipulations I could, but

(Testimony of Russell Mowry.)

I have learned long ago, your Honor, not to make stipulations about contracts that I have not read.

The Court: Now, with reference to those that have been produced——

Mr. Winter: (Interrupting) I want them in evidence as copies of the contracts. I am not trying to prove any [66] facts except the contracts which you by your statement admit are the company's contracts which you had with these men.

Mr. Carey: I want the record to show, your Honor, that I am not admitting anything by my statement except the things that I have stated.

The Court: Let the record show that, and try to avoid making unnecessary statements, Mr. Winter. Let each one of those three files be marked with a separate identification mark. Is that satisfactory?

Mr. Carey: Yes.

Mr. Winter: When they are marked, we have no objection that they remain in court, and that they may be withdrawn, and if any contingency arises, that copies may be substituted. It is rather difficult to get——

The Court: (Interrupting) Very well. That is sufficient.

Mr. Carey: For the purpose of the record, your Honor, I want to object to the introduction of these in the absence of any showing as to the materiality of any one of these contracts to the matter in controversy between the Alaska Pacific Salmon Company and the Government.

(Testimony of Russell Mowry.)

The Court: Then I will have to hear further on that. Do you have some witness that you wish to inquire from concerning their materiality?

Mr. Winter: Well, if your Honor please, they are material right on the face of them, because the sole question here is what wages—it is incumbent upon the Plaintiffs to show what wages were paid, and that they were erroneously paid. Now, if it is shown under the contract that it was agreed to furnish board and room, or [67] in lieu thereof, an allowance, the materiality—

The Court: (Interrupting) Will you point out in the exhibit somewhere where it does show that?

Mr. Winter: Yes, your Honor.

The Court: And then the court will consider the question.

Mr. Winter: May we have these contracts marked for identification?

The Court: They may be marked for identification.

(Whereupon file containing 7 1937 contracts between Alaska Pacific Salmon Company and various unions marked Defendant's Exhibit A-2 for identification; file containing 6 contracts between Alaska Pacific Salmon Company and various Unions covering 1938 operations marked Defendant's exhibit A-3 for identification; and file containing 6 contracts between Alaska Pacific Salmon Company and various unions covering 1939 operations marked Defendant's Exhibit A-4 for identification.)

(Testimony of Russell Mowry.)

Mr. Winter: I will point it out in A-2.

The Court: I will look at them in just a moment. Is there anything on the outside to show what year they are for?

Mr. Carey: Yes, there is.

The Court: I note that A-2 is for 1937. Are those the contracts that you mentioned some time ago, Mr. Carey?

Mr. Carey: Yes.

The Court: And 1938 is A-3, and 1939 is A-4.

Mr. Winter: In the first contract, it provides that there shall be furnished to the men three full meals a day from the mess house; also it provides that in the event—in several places it is also in the contract [68] in the event that if the boat should be late on leaving or in discharging, they should get a sustenance of \$3 a day, and all such items as that.

The Court: Will you take one of the contracts and refer to the page and paragraph?

Mr. Winter: Yes. In the first paragraph of the Alaska Pacific Salmon Company's contract for southeastern Alaska, a part of A-2——

The Court: A part of A-2 for identification which relates to the year 1937?

Mr. Winter: Yes.

The Court: All right.

Mr. Winter: And that provides on page 1——

The Court: (Interrupting) In what paragraph?

Mr. Winter: Well, in paragraph 13 it says:

(Testimony of Russell Mowry.)

“Fresh meat, fruit and vegetables shall be furnished whenever obtainable.”

And then in paragraph 16, it says: “All men to be furnished first-class transportation or transportation on a tender which shall be considered satisfactory, provided that there shall be a regular bunk for every person aboard.” That is on page 3.

The Court: I would rather not have anything except lodging and boarding.

Mr. Winter: Well, the contract refers to it in so many different ways that it is impossible to say—well, here is one in paragraph 36.

The Court: On what page?

Mr. Winter: On page 7. “The Company, through its superintendent or agent in charge at any time may [69] discharge any party of the second part for refusal to perform work, or for any other just cause, and his wages shall cease at the date of such discharge. However, if any employee is found to have been arbitrarily discharged, he shall be paid the wages he would have normally earned during the period lost by reason of such wrongful discharge, plus \$1 per day for board, provided such employee paid board and was not otherwise employed during such period; all subject to adjustment by reason of wages such employee earned from time of dismissal.”

That is, upon dismissal, they agree to pay for board.

And then paragraph 48, page 8, provides:

(Testimony of Russell Mowry.)

“The mess house crew shall prepare and serve the three regular meals each day. During the canning season, if coffee is served at other than regular meal hours, the mess house crew shall prepare same without overtime. If, at midnight, any cook is required by the superintendent, foreman or captain in charge to prepare and serve an additional full hot meal for members of the crew working at night, he shall receive three hours’ overtime.”

The Court: It does not say at whose expense.

Mr. Winter: That is what the Alaska Pacific Salmon Company agreed to do.

The Court: Let me see that, please. I imagine that there is some one person who is familiar with these contracts who can point out more definitely any provision herein which sets an obligation on the part of the employer to provide or pay for lodging and board.

Mr. Winter: I beg your pardon? [70]

The Court: I rather suspect that there is some one person who is familiar enough with these contract forms to be able more quickly to point out the pertinent parts of it that relate to the obligations, if any there are, on the part of the employer to provide lodging and board. I wish that you would find that out. This is rather an isolated condition. This is not the usual working condition that you referred to in paragraph 36. This is a condition that comes into operation upon the discharge of some employee, I believe.

Mr. Winter: Yes, your Honor. If there was not

(Testimony of Russell Mowry.)

an obligation to furnish him board and room, during the time that he is working, certainly there would not be an obligation to do so during the time that he is discharged. That is a protection to him, that he should still get his board and lodging. These union contracts are in rather——

The Court: (Interrupting) The ruling is reserved. Proceed with something else until you get somebody who is more familiar with it, and after you do, I will be glad to consider it again.

Mr. Winter: We haven't had copies of these contracts until just now.

The Court: I know. Proceed with something else then.

Q. (Mr. Winter, continuing) Did your company have an agreement with the union to furnish board and lodging to the cannery workers?

Mr. Carey: Just a minute. I object to that for the reason that I have already stated, that the contracts are the best evidence. We are prepared to produce them as soon as they can be produced. Counsel has made no demand [71] for them up to now.

The Court: That objection is sustained.

Mr. Winter: All right.

Q. (Mr. Winter) Did your corporation have similar contracts or similar labor agreements with your employees in the areas covered by Exhibits A-2 to A-4, inclusive.

Mr. Carey: I object to that, your Honor, for the reason that so far this witness has not testified that he has any familiarity with the 1937, 1938 and 1939

(Testimony of Russell Mowry.)

contracts of the Alaska Pacific Salmon Company. We are prepared to admit or to produce the contracts of the Pacific American Fisheries, and when produced, they will speak for themselves.

The Court: The objection is overruled. If this witness knows, he may answer that question.

Mr. Carey: He might guess at it, but he cannot know.

The Court: I believe that this witness is sufficiently intelligent to be able to say whether or not he knows or to state what he does know.

Q. (Mr. Winter) Let me ask this first: you had a cannery in southeastern Alaska, did you not, Mr. Mowry? A. Yes.

Q. Did you have a union agreement with the cannerymen, trapmen, gear scow men, web and wire men, beach men, utility men and mess house employees? A. Who is this signed by?

Q. Did you have a contract with that Union?

A. You haven't stated any union yet. There is a CIO Union and there is an A F of L Union.

Q. With the Alaska Fishermen's Union? [72]

A. Yes, to my knowledge we did.

Q. And was it similar to the first contract appearing in A-2?

Mr. Carey: I object to that as immaterial.

Mr. Winter: I will reframe the question.

Mr. Carey: Just a minute, please.

Mr. Winter: I have withdrawn the question.

Mr. Carey: All right.

Q. (Mr. Winter, continuing) Was it on the

(Testimony of Russell Mowry.)

same form as the first contract, or the contract so designated in Defendant's Exhibit A-2?

Mr. Carey: I object upon the same ground, and for the same reason, that the contract when produced is the best evidence, and we are willing to produce it.

Mr. Winter: I am not asking him to state anything that is in the contract. I am just asking him if he had such a contract.

Mr. Carey: That does ask him to state everything in the contract. When he produces a contract from one company and asks him if the contract of another company is identical with it, why, of course, that is asking him to state everything in the contract.

The Court: That objection is overruled.

A. I would say that it is a similar form.

Q. (Mr. Winter) It is the same form with a different——

A. (Interrupting) I would not be absolutely sure.

Mr. Carey: I move to strike the answer. If the witness knows, he can state positively.

The Witness: No.

Mr. Carey: He should not be guessing at it, even if he [73] is my witness.

The Court: I think that the motion should be granted in view of the witness' last remark that he cannot be absolutely sure.

Q. (Mr. Winter, continuing) You cannot be absolutely sure?

(Testimony of Russell Mowry.)

A. That is signed by the Alaska Pacific Salmon Company. The last page may be different.

Q. Who prepared the contracts? Did the Unions prepare them?

A. In those years, they did, yes.

Q. And all in the industry signed the same contract?

A. I would not say that.

Q. Don't you know that as a matter of fact, you conducted negotiations jointly with the Unions for these contracts?

Mr. Carey: I object to that.

The Court: This relates to another matter not related to the contract. It relates to the witness' part in negotiations. That objection is overruled.

A. You will find 1937 and in 1938 that the Unions conducted their own negotiations with the different canning companies, and there might be different contracts for the same Union. Now, in 1939——

Q. (Mr. Winter) Well, was there any different contract with respect to board and lodging which is to be furnished?

A. I cannot tell you without looking at our agreement.

Q. Well, isn't that——

Mr. Carey: I submit that this is an answer.

The Court: Yes.

Q. (Mr. Winter, continuing) Did your company have an agreement with the same Union, covering tendermen, fishermen, trapmen, utility men and cooks, with the Alaska Fishermen's Union, for

(Testimony of Russell Mowry.)

the Westward Canneries that you had, or did you have a [74] Westward Cannery?

A. Yes, we had a Westward Cannery—we had two of them.

Q. I want you to look at this contract and tell me whether or not you had a contract——

The Court: (Interrupting) I think that the witness has already indicated a lot of knowledge of detail, which makes it inadvisable to take up any more of the time of the Court to ask him about that.

Mr. Winter: All right, your Honor.

The Court: At least until the witness has had a chance to compare this form with his own form, if and when he is able to get hold of his own company's form, he should not be called upon to answer that.

Q. (Mr. Winter) Did you have the same type of contract with the Prince William Sound Fishermen's Union?

Mr. Carey: I make the same objection, upon the ground that that question now is right in defiance of your Honor's ruling a moment ago.

Mr. Winter: I am just asking him whether he had such a contract.

Mr. Carey: We will produce all of them, we said.

The Court: Objection sustained. In view of the witness' last two or three answers, I think that the Court ought to give him an opportunity to look at his own company's contracts.

(Testimony of Russell Mowry.)

Mr. Winter: In view of that statement, we would like to ask for a continuance until they can be produced.

The Court: Maybe there is some other evidence that can be produced in the meantime, Mr. Winter. I will see if there is, before acting on this motion. Do you have anything further? [75]

Mr. Winter: Not until we get the contracts. I would like to have the Court give me permission to reserve my cross examination.

The Court: The Court will give you that permission to reserve it. Do you have any further questions that you want to ask, Mr. Carey?

Mr. Carey: No.

The Court: You may be excused, temporarily, Mr. Mowry.

(Witness excused)

The Court: Call your next witness.

Mr. Carey: We rest.

Mr. Winter: Before you rest, we would like to recall Mr. Tegtmeyer.

The Court: He does not seem to be here right now. Is Mr. Tegtmeyer present?

Mr. Carey: He does not seem to be here right now.

Mr. Winter: Perhaps counsel will stipulate that these are the contracts of the Alaska Pacific Salmon Company without us waiting to call Mr. Tegtmeyer, unless you want to be captious about that.

Mr. Carey: I move to strike that statement.

The Court: Mr. Winter, I want to say this, that if you make another remark like that, the Court is going to hold you for contempt. There was not a thing happened that justified you to make that remark. I just cannot have that in this court room.

Mr. Winter: I am sorry about the remark, but it seems to me, if the Court please, that this is such a minor matter that it should be before the Court. We are not concerned with a criminal case, if your Honor please. [76] We want the true facts. We want to have what contracts were entered into so that the Court may determine the real issue in this case. Ordinarily, in an income tax case——

The Court: (Interrupting) Mr. Winter, your present statement appears to the Court—well, while doubtless made in entire good faith on your part, it amounts to nothing more than popping off steam.

Mr. Winter: I am sorry.

The Court: It is not necessary to make it. If you wish to present a motion or make a request to the court, I will consider it.

Mr. Winter: We will request a continuation at this time in order that we may call the parties to the contracts covering both companies so that we can get them all here, and we will have to get subpoenas out to get them here, if the Court please.

The Court: Do you have any objection, Mr. Carey?

Mr. Carey: No, I have not, your Honor. If counsel will indicate to me what parties or witnesses he wants, I will undertake to get them here without the necessity of a subpoena. I cannot guarantee

anything, and I think, your Honor, that he will have very great difficulty subpoenaing the operating officials now, because the operating season is on. Most of them are in Alaska. That is the reason I had these two men here. But if counsel wants a continuation, he certainly encounters no objection from us.

The Court: You expect to inquire further from Mr. Tegtmeyer? [77]

Mr. Winter: Yes, your Honor.

The Court: Do you wish to try to get him on the phone, or do you think that you might do that possibly within a few minutes and make any further progress this afternoon?

Mr. Winter: May we have a recess, your Honor?

The Court: Yes.

Mr. Winter: For ten minutes?

The Court: The court will now be at recess for ten minutes.

(Recess.)

The Court: You may proceed.

Mr. Winter: We have no further cross examination of the witness.

The Court: All right. The witness is already excused from the stand.

Mr. Winter: Do you rest?

Mr. Carey: We rest.

(Thereupon, the Plaintiffs rested their case.)

Mr. Winter: At this time we move to dismiss these consolidated cases on the ground that the

plaintiffs have failed to state a cause of action or to prove a cause of action in this case. The Plaintiff, the Pacific American Fisheries, Incorporated, alleges in Paragraph 2 of this complaint:

“To operate said canneries efficiently or at all, it was necessary that the Plaintiff in advance of the fishing and operating season transport practically all of its help from Bellingham, and Seattle, Washington, and from Portland, Oregon, to its several Alaska canneries and return them to the several ports of embarkation at the end of the fishing and operating season. During the fishing and [78] operating season, it was necessary that the plaintiff as a part of its operations furnish such employees with lodging and sustenance at the canneries at which they were employed”,—which could be nothing but compensation, and they furnished it. They furnished it to their employees. It is not alleged that it was a gratuity.

The Court: And you admit that in your responding pleading?

Mr. Winter: Well, for the motion, of course, we have to admit it. It is admitted for the purpose of the motion. This is a motion based entirely upon the proof and the pleadings in this case.

The Court: I would like to know as a matter of fact whether your answer admits that allegation.

Mr. Winter: I think that we filed a general denial to that paragraph of the complaint, our general denial of course, running to the fact—we said that we had no information or belief as to the

falsity or truth of the allegation. I think that that is the answer—our answer.

Paragraph 2. "The defendant has no information sufficient to form a belief concerning the allegations contained in paragraph 2 of Plaintiff's complaint, and therefore denies the same."

But it must be admitted for the purpose of the motion. This is a motion to dismiss on the failure of proof. The burden is not upon the defendant to prove anything if the plaintiff has failed to prove a case. And they admit that they furnished their employees with lodging and sustenance. Their only contention is that it would have been impossible for the plaintiff to have operated its [79] canneries unless they did furnish their employees with this additional form of compensation, which we contend it is.

The Court: The motion is denied with leave to renew the point in any appropriate way in other appropriate stages of the proceedings.

Mr. Winter: Yes, your Honor. Now, we have a witness that we would like to call out of turn.

The Court: You feel that the Government's position is sufficiently covered by what has already been said without the necessity of an opening statement?

Mr. Winter: I think so, Your Honor. The only issue is whether or not board and lodging were furnished, and they admit that board and lodging was furnished, or additional compensation.

The Court: Very well. Proceed.

DEFENDANT'S CASE:

AUGUST BUSCHMANN

called as a witness on behalf of the Defendant having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Winter:

Q. Will you state your name, please?

A. August Buschmann.

Q. Where do you reside, Mr. Buschmann?

A. Seattle. [80]

Q. You were the chairman of the Labor Committee of the Alaska Canneries' Association during 1936, 1937 and 1938, wern't you?

A. Well, I was chairman of the negotiating committee.

Q. You were chairman of the negotiating committee?

A. Yes, sir. But I do not think in 1939.

Mr. Carey: What year is that?

Q. (By Mr. Winter) What year did you start?

A. I am not positive now whether it was 1935 or 1936.

Q. You are not positive now whether it was 1935 or 1936?

A. That is right, but I think it was one of those years.

Q. And how long did you hold that position as—

A. (Interrupting) Oh, I worked on that for two or three years. I think 1937 and 1938.

(Testimony of August Buschmann.)

Q. And in 1938, you were a member of the Fact Finding Board of the Canned Salmon Industry, weren't you? A. Yes, sir.

Q. Who were the other members of that Fact Finding Board?

A. Mr. Smith and Mr. Melnikow of San Francisco.

Mr. Carey: Pardon me.

The Witness: Mr. Smith and Mr. Melnikow of San Francisco.

The Court: Do you know the first names of either one of those men?

The Witness: No.

The Court: Who was the chairman of that Fact Finding Board?

The Witness: Mr. Smith was the chairman.

The Court: What business was he engaged in, so as to identify him? [81]

The Witness: He was an attorney in San Francisco.

The Court: Do you know what firm he was connected with?

The Witness: No. I think that he was by himself.

The Witness: I think that it was in the Balfour Building.

Q. (Mr. Winter, continuing) Do you know Mr. Melnikow's initials?

A. Henry T. Melnikow.

Q. And who was Mr. Melnikow?

A. I think that he was—I think that he had an

(Testimony of August Buschmann.)

auditing arrangement, as I recall it now. I didn't know him intimately.

Q. What was the occasion, or how was that Board formed, Mr. Buschmann?

A. How was the Board formed?

Q. Yes.

A. Well, during our negotiations for the 1938 labor scale, the packers and the unions could not agree, and it was decided by the packers—let me see now,—well, we just decided, or agreed, rather, to form a fact finding board.

Q. And whom did you represent on that Fact Finding Board?

A. I represented the packers.

Q. What position did you hold with the packers in their Association at that time, and what was the name of their Association?

A. Well, I didn't hold any particular office, or did not have any particular title in their association at that time.

Q. Well, were you Chairman of their Labor Committee? [82]

A. Yes, I was chairman of their Labor Committee.

Q. And how long did you remain as chairman of the Packers' Labor Committee?

A. Two or three years.

Q. Was that in 1940?

A. It was in 1935, 1936 and 1937, and 1938, possibly. I am not certain now. Just three or four years.

(Testimony of August Buschmann.)

Q. And who on that committee represented the Employees' Unions? A. Mr. Melnikow.

Q. And did you and Mr. Melnikow appoint the third member of the Board? A. Yes.

Q. And you conducted, or did you conduct hearings to determine the facts, or what did you do?

A. Yes, we held some hearings. We heard anybody that wanted to be heard.

Q. I see. And what did you do with respect to calling upon the Canned Salmon Industry with respect to the costs?

A. Well, most of them furnished us statements of their operations—covering their operations.

Q. Did they furnish you a report of their 1937 operations? A. I think that they did, yes.

Q. Did you make a ruling in accordance with the agreement to mediate your differences?

A. Yes, sir.

Mr. Winter: I will have this marked for identification.

(Whereupon, copy of report of findings of Fact Finding Board marked Defendant's Exhibit A-5 for identification.)

Q. (Mr. Winter) I will show you what has been marked for [83] identification as Defendant's Exhibit A-5, and I will ask you to state what that is.

A. Well, it looks like a copy of the findings of the Fact Finding Board.

Q. Was that report mimeographed, to your knowledge? A. Yes.

(Testimony of August Buschmann.)

Q. Do you have a copy of it in your files?

A. I did have. I do not know whether I have it now or not.

Q. You do not know whether you have it now or not? A. Yes, sir.

Q. You say the packers of the Canned Salmon Industry in Alaska had differences with their employees in 1938 concerning the wages to be paid during the approaching season?

A. That is right.

Q. What was the situation? Did they want a lower or a higher scale for that year?

A. You mean the employees?

Q. Well, what was the difference, generally—so that we can understand it.

A. Well, the packers wanted to reduce the scale on account of the deplorable conditions in the Salmon Market at that time. They felt justified in asking for a substantial reduction in the rate of pay for that coming year.

Q. Based upon Defendant's Exhibit A-5, were master contracts drawn up with the various unions relative to the pay scale which was agreed to in that report?

A. Yes, I think there was, yes.

Q. And does this report—what does this report show—does this report show the scale which was agreed upon between labor and industry as to fishing in Alaska? [84]

A. Well, it not only applies to fishing, but it also applies to other kinds of employment besides fishing.

(Testimony of August Buschmann.)

Q. By the canneries? A. That is right.

Q. Of employees by the canneries, is that right?

A. I think that it covers practically all. There were some exempt that did not come under the findings of the Fact Finding Board.

Q. Would you just state to the Court the companies which were subject to this Board's report, and who agreed to this award to be made by you as representing the Canning Industry, Mr. Melnikow representing Labor, and the other gentleman representing the third party?

Mr. Carey: I presume that the document itself shows that.

Mr. Winter: Well, we will offer it in evidence, if the Court please.

The Witness: There is——

Mr. Carey: (Interrupting) Just a minute, Mr. Buschmann.

The Court: Do not read from it, Mr. Buschmann.

Mr. Carey: Does the document itself show who the packers were that you were representing?

The Witness: Yes.

Mr. Carey: Well, then, that is the best evidence.

Mr. Winter: Well, we will offer it in evidence.

Mr. Carey: I object at this time, because it is not yet shown to be material to this present controversy. I have not seen it, but from what counsel says, he apparently is offering this at this time because it has some relation to the 1938 contracts that were made in that year. [85]

The Court: Will you point out——

(Testimony of August Buschmann.)

Mr. Carey: (Interrupting) The objection that your Honor suggested as to the 1938 contracts would also apply to this. Until the contracts have been shown to be material, or some part of them shown to be material, then what preceded the contract would not be material.

The Court: Will you mark in the margin the part that you feel is material in this action, or in this trial, and submit it to opposing counsel? Will you mark that on the margin, and you might give me the citation of that marginal reference?

Mr. Winter: Well, your Honor, the materiality of this document is that this document in conjunction with the other contract will show the whole picture. I cannot put one document in to prove every situation. Your Honor asked me with respect to the 1938 contracts, as to whether they were material, and on that, well, I attempted to point out, if the Court please, that that award which was agreed to was binding upon every party represented by these members on the Board, and the fact that it was binding upon both of those corporations during 1938 ties in with this paragraph of the contract with the cannery workers, of April 28, 1938.

The Court: Could you now give me the page and paragraph that you have given to counsel?

Mr. Carey: The paragraph that counsel marked and handed to me appears under the title, "Cannery Workers, all districts except Southeastern Alaska", at the bottom of page 4 of this document that has been marked as I recall for identification. [86]

(Testimony of August Buschmann.)

The Court: Now, have you had a chance to consider its materiality?

Mr. Carey: Yes, your Honor.

The Court: Do you still make that objection?

Mr. Carey: Yes, except that I make it stronger because having read it, it now appears that it has no material value, if that is the paragraph that counsel has in mind.

Mr. Winter: I will show that it is material——

The Court: (Interrupting) I think that it would be better to reserve ruling upon it, because it is possible that I may——

Mr. Winter: (Interrupting) Of course, I want to ask the witness from the document what is meant by a certain term in there, and tie it up with the—you see, the Board is referring to the basic wage. I will ask this question, if your Honor please.

Q. (Mr. Winter) Was there anything considered by the Board excepting the basic wage? By that, I mean, did the Board consider any question of the reasonableness of board and room, or anything of that nature?

Mr. Carey: Just a minute. I object to that upon the ground that the decision of the Board being in writing, that it the best evidence of what that decision was, and it speaks for itself.

The Court: He does not ask him to state what that decision was. He is asking him concerning the fact of a decision or not. The objection is overruled. He may answer.

(Testimony of August Buschmann.)

A. What is the question?

The Court: Read the question. [87]

(Last question read)

A. Well, I do not think that board and room were discussed particularly, but by basic pay there, I think that we meant the monthly pay excluding overtime.

Q. (Mr. Winter, continuing) You mean the cash received?

A. Well, cash received, excluding the overtime.

Q. Yes. Was there any dispute or any difference between the canners' association and the employees of the Union with respect to board and room being furnished.

Mr. Carey: I object to that as immaterial. Here you are dealing with a decision that amounts to a Board of Arbitration, and of course, the decision being in writing, it speaks for itself. What they did not put in writing is, of course, no part of the decision, and it assists nobody. It is merely hearsay.

The Court: That objection is overruled. Until he asks for the contents of the document, it is not objectionable on the ground that you have mentioned. He may answer.

The Witness: What was the question?

(Question read)

A. No.

Q. (Mr. Winter) Was that matter considered—was the board and room considered in arriving at the pay scale—the basic pay scale that was considered by the Board?

(Testimony of August Buschmann.)

Mr. Carey: Now, just a minute. On the basis of the witness' last answer, I object to the document, and I object to any further examination concerning it, because any testimony here now as to a matter that was not in dispute, and that is what Mr. Buschmann says, cannot possibly be material in this case. This Board, according to Mr. [88] Buschmann, was appointed to consider things that were in dispute. Their decision as to matters in dispute, I believe, is represented by the document.

The Court: In view of the witness' last two answers, Mr. Winter, it seems to me that he has excluded any knowledge of them, which is the answer called for by your present question.

Mr. Winter: If the Court please, I think that your Honor misunderstands.

The Court: (Interrupting) I may have. Will the reporter read the last two questions and answers, and the present question?

(Questions and answers read)

Mr. Winter: I probably confused the Court and counsel both. I will reframe the question.

Q. (Mr. Winter, continuing) What I meant, was there any dispute between the employers and the employees with respect to board and room—with respect to the type of board and room that had previously been furnished, and were the Unions demanding a different type of board and room, or a different deduction where they did not accept board and room from the company?

(Testimony of August Buschmann.)

A. I do not believe that that came up in the fact findings at all.

Q. In considering the basic pay and arriving at your award, did you or did you not take into consideration the fact that in some instances, and in most instances, in fact, in the remote parts of Alaska, board and room were being furnished by the Company?

Mr. Carey: I object to that, that a matter that was not considered cannot possibly be considered material here. [89] The document if it is material in any respect speaks for itself when and if introduced in evidence. It has not been offered as yet, but simply marked for identification.

The Court: There is something about the answers given to the witness to the previous questions that makes me think that this is covered by the preceding questions and answers. Objection sustained.

Mr. Winter: Well, I will put it this way, your Honor——

Mr. Carey: (Interrupting) Putting the same question in a different way, I submit, your Honor, does not overcome the objection.

Mr. Winter: I will submit it to your Honor, and you can rule on it.

The Court: Sometimes any one of us at a given moment might not be able to state the thought in language that is apt. We might state it in language that might seem objectionable, and the question put in a different form might seem to meet the objection. Proceed.

(Testimony of August Buschmann.)

Q. (Mr. Winter, continuing) Mr. Buschmann, what was the question submitted to the Board for consideration, and the answer which the Board was to consider, and you may use that to refresh your memory if you care to.

Mr. Carey: He does not have to refresh his memory from anything. The document speaks for itself, doesn't it?

Mr. Winter: I object to this ever stopping on the question before the witness can even get a chance to answer it.

The Court: That objection is not sustained of yours. If you have not finished your question, I will ask counsel to wait until you have finished your question, and then [90] he may register his objection. Have you finished the question?

Mr. Winter: Yes.

The Court: Read the question.

(Last question read)

The Court: I would suggest that you strike the question and restate it.

Mr. Winter: Yes, I will do that, your Honor.

Q. (Mr. Winter, continuing) Mr. Buschmann, will you just state to the Court what question, under the terms of the agreement setting up the Board, the Board was directed to answer?

Mr. Carey: Just a minute.

Q. You may use that document to refresh your memory.

(Testimony of August Buschmann.)

Mr. Carey: May I look at the document for a moment before I make my objection on the question?

The Court: Yes.

Mr. Carey: As I understand it, he is asking Mr. Buschmann as a member of the Board to state what question was submitted to the Board and what the Board did.

The Court: Just let us see what the question is. Read the question.

(Question read)

Mr. Carey: Well, the report shows why the Board was constituted, and what it was constituted for, and what the question was that it was trying to settle. So if the findings are material, the document speaks for itself.

Mr. Winter: We submit, if the Court please, that the document does not show any such thing, as we expect [91] to elicit from this witness. What we want from this witness, if the court please, is that we want him to tell us what question the Board was constituted to answer, and whether or not in arriving at that answer it took into consideration, which may or may not be within the report, the question of whether or not the award was reduced by virtue of additional compensation having been made in the way of board, room and sustenance.

Mr. Carey: Now, I make the objection——

The Court: (interrupting) Objection sustained.

Mr. Winter: We want to re-offer this exhibit, if the court please, because I want to ask him what he

(Testimony of August Buschmann.)

meant by a statement contained therein. After all, we have——

The Court: (Interrupting) If you will point out some part of it that is material in these issues, I will be glad to look it over.

Mr. Winter: I was referring to the Cannery Workers and where reference is made to basic pay.

The Court: What page is that on, and what paragraph? Let me see it.

Mr. Buschmann: I will hand it to the Court. (Handing document to the Court). It is on page 4, in the last paragraph, under the Summary.

The Court: Objection sustained.

Mr. Carey: That is the same thing that came up before.

The Court: And the court understood that you were renewing the same objection.

Mr. Carey: Oh, yes, sir; because it is the same offer.

Mr. Winter: I will ask permission to renew my offer, [92] and if I may, I would like to explain the purpose of why I think that it is material, and why I think that the question I ask the witness is material and he should be allowed to answer the question.

The Court: You may do so.

Mr. Winter: The witness is now testifying that they did not consider only the cash remuneration, but the report also shows under that particular exhibit that, as the result in the reduction of per month basic pay, and I want to ask the witness what the committee meant by that exhibit. It seems to me that

(Testimony of August Buschmann.)

if the committee considered—in view of the witness' answer—if the committee considered that this was just merely basic pay and not the full compensation which was being paid to these employees——

The Court: (Interrupting) Objection sustained.

Mr. Winter: Note an exception.

The Court: Allowed. If, later on, in connection with some other testimony the materiality appears, I will be glad to hear your re-offer.

Q. (Mr. Winter, continuing) I will show you, Mr. Buschmann, what has been marked for identification Defendant's Exhibit A-3, and particularly the contract or agreement between the Alaska Pacific Salmon Company, which is in blank, dated April 27, 1938—I will strike that.

Mr. Carey: Your Honor, may I make a suggestion that possibly will save time on this matter?

The Court: Yes, you may.

Mr. Carey: Now, I have made the best inquiry I can, and I find that there are a number of contracts at the PAF covering the three years in question here—a quite a [93] lot of them. I do not know how long it will take to assemble them. The only thing that I can do is to telephone to Bellingham and try to get somebody who can sort them out and send them down here by special messenger. I haven't the slightest idea how many there may be. I think that it would save time if your Honor would adjourn at this time and let me start that search in Bellingham. In the meantime, I have no objection whatever to letting Mr. Winter take these Alaska Pacific contracts

(Testimony of August Buschmann.)

to his office if necessary, and examine them, and then when he comes back, be prepared to tell us which ones he considered to be material and which ones he does not.

I am looking forward to this situation, your Honor, and I know that your Honor won't misunderstand me when I say that it is conceivable, of course, that this case might go to the Circuit Court of Appeals at the instance of one party or the other. Obviously, it is desirable not to load this record up with a great number of contracts which may turn out to be utterly immaterial, because the printing bill is a matter to be considered here. So I think that counsel, after these contracts have been turned over to him, ought to examine them and find out which ones he thinks are material, and advise the court which ones he thinks are material, and then I can either object or not object as seems to me proper.

Mr. Winter: Of course, our position is that every one of these contracts is material, because they are the contracts of employment by which these employees were paid.

Mr. Carey: Of course, your Honor has indicated that [94] you do not go that far with counsel.

The Court: The thought that I had in mind, Mr. Carey—possibly your point is one that could be determined after the trial was concluded, but I am interested more now in having somebody in the case able to point out with respect to the instruments that are not yet received in evidence but have been of-

(Testimony of August Buschmann.)

ferred and the ruling reserved or the ruling denied, or the offer denied, rather, the particular paragraphs which relate to the provisions respecting furnishing by the employer of this lodging and board, and the reason for furnishing them and whether they should be treated as such or not.

Mr. Winter: I have here, your Honor, paragraph 20 which answers your Honor's question.

Mr. Carey: Of which contract?

The Court: And which page?

Mr. Winter: That is paragraph 20 of the contract with the Cannery Workers for the year 1939, and it is a part of Defendant's Exhibit A-4.

Mr. Carey: Of course, that is only one of about 20 contracts covering 3 years. Now, if that is the only contract that counsel is interested in, then we ought to take that up and find out whether it is admissible or not, and not load the record up with a lot of others that have no relation to this matter at all.

The Court: This states: "three wholesome meals". This is something that I have not seen before. That is in paragraph 20, page 5 of the form of contract of 5-19-39, with the Alaska Pacific Salmon Company. Now, where do you find out what group of employees this contract relates to? [95]

Mr. Winter: That is on the first page. It relates to cannery workers. I think it states "Cannery Workers" on that page.

The Court: Yes.

(Testimony of August Buschmann.)

Mr. Winter: Then we will have the master contract with all the unions——

The Court: You are interrupting the Court. Let the Court finish.

Mr. Winter: I am sorry.

The Court: This language is something that the Court has not previously noticed. This is in paragraph 20 on page 5, "The Company will furnish three wholesome and adequate meals each day during transportation and while at the cannery. Also suitable living quarters while at the cannery, and bunk, spring and mattress, but employee shall furnish all his other bedding, clothing and personal effects, and, excepting for his own negligence, the Company shall not be responsible for any damage to or loss of any of the employee's bedding, clothing, or personal effects from any cause whatsoever."

The Court feels that that makes the contract material evidence in this case. Does your objection run to the point that the contract lacks proper authentication and identification, Mr. Carey?

Mr. Carey: No, your Honor. I have tendered them to the Court as copies, and of course, I would not put myself in a position of tendering something as a copy and then make the objection that it was not.

The Court: Do you have any objection to this paragraph 20—the part of Paragraph 20 just read by the Court? [96]

Mr. Carey: No, but I do not think——

(Testimony of August Buschmann.)

The Court: (Interrupting) You do not think that it is material?

Mr. Carey: I do not think that it is material. I have no objection to it——

The Court: (Interrupting) I think it is pertinent or material.

Mr. Carey: My suggestion was not in the form of an objection. It is that counsel ought to point out to the court which contracts he claims contains anything that he thinks is material, and then if your Honor finds anything in that particular contract that you think is material, then I will either object to it or I won't.

The Court: Well, here is one of them that the Court regards as material.

Mr. Carey: I am perfectly willing to have that particular one in because I think that it is my way.

The Court: Let the record show which one that is, will you please?

Mr. Winter: That is the contract dated 5-19-39, agreement with the United Cannery, Agricultural, Packing and Allied Workers of America.

The Court: You say "with". The agreement of whom with?

Mr. Winter: That is the way it is entitled. It is an agreement between the Alaska Pacific Salmon Company, a corporation——

The Court: (Interrupting) All right.

Mr. Winter: And the United Cannery, Agricultural, Packing and Allied Workers of America, in behalf of Local—and that is blank. [97]

(Testimony of August Buschmann.)

The Court: And it is now a part of Defendant's Exhibit A-4, isn't that right?

Mr. Winter: That is a part of Defendant's Exhibit A-4, yes.

Mr. Carey: If counsel wants to offer that as an exhibit, I will have no objection to it.

The Court: The court rules on this now that this one is admissible, but I am not going yet to admit it until I see what others in that same file or exhibit are.

Mr. Winter: Well, your Honor, every one of them—I think that when we get the master contract upon which these contracts are based, which covers the whole industry, and we will have them here tomorrow——

The Court (Interrupting): I am going to take a continuance now until tomorrow of these proceedings, and I am going to ask you to be prepared tomorrow to point out which one has in it a provision similar to that, or any other provision that you claim makes it material in this action. Call that to the court's attention, unless you agree on it before that is done. Maybe if you call those things to the attention of your opponent, he may agree with you which ones are in that class, and which ones are not.

Mr. Carey: I would be glad to attempt to do that, but I have so many other things to do that I cannot be in two places at once.

The Court: If you gentlemen cannot agree which ones have such clauses in them, why, I will take

(Testimony of August Buschmann.)

the whole group of them up and look at them at the place where counsel requests me to look at them.

[98]

Mr. Winter: As I say, we think all of the contracts which are contracts of employment here, are——

The Court (Interrupting): This matter is continued now until tomorrow morning at ten o'clock, and have your witness and your proof here at that time.

Mr. Winter: May we withdraw these exhibits now so that we won't have to prepare an order to withdraw them?

The Court: Well, what does counsel think about it? Is it so stipulated, and you won't hold the clerk responsible in case that they are lost?

Mr. Carey: If Mr. Winter personally agrees that he will get them back here tomorrow morning by ten o'clock, that is all right with me.

Mr. Winter: I do agree.

The Court: And the Clerk is absolved between this time and tomorrow morning at ten o'clock for these exhibits marked now for identification—what are they marked?

Mr. Winter: Defendant's Exhibit A-1, A-2, A-3 and A-4.

The Court: Do you need A-1? That is already admitted. How about A-5, the so-called Fact Finding report?

Mr. Winter: No, your Honor, I do not need that, nor do I need Defendant's Exhibit A-1.

(Testimony of August Buschmann.)

Mr. Carey: With reference to A-5, that document has been marked for identification only and not offered yet, so I suppose that it is still his if he wants it.

The Court: Well, it will be in the Clerk's custody.

Mr. Carey: Well, I have no objection to whatever ones he wants to withdraw.

Mr. Winter: I would like to withdraw Defendant's [99] Exhibit A-2, A-3 and A-4.

The Court: Well, this agreement and stipulation covers Defendant's Exhibits A-2, A-3 and A-4. You may take them with you to your office until tomorrow morning at ten o'clock.

Mr. Carey: And in the meantime I will do the very best I can to get those contracts down from Bellingham, but I cannot give you any guarantee in regard to them.

The Court: Try to be in shape to proceed in the morning at ten o'clock, although we might have an interruption in the proceedings at that time. I cannot tell about these condemnation matters that are submitted to the Court.

At this time, court is adjourned.

(Whereupon, an adjournment was taken at four p.m. July 8, 1942, to 10:00 a.m. July 9, 1942.) [100]

10:00 o'clock a.m.

July 9, 1942

The trial was resumed, pursuant to adjournment.

(All parties present as heretofore noted.)

The Court: With reference to the case on trial, you may proceed.

Mr. Winter: Do you have something to say?

Mr. Carey: I do not know where we left off last night. I have now received from Bellingham a large number of files, and I wonder if counsel wants me to identify them now.

The Court: That is agreeable to the Court, if that is to both counsel.

Mr. Winter: Yes, it is to me.

Mr. Carey: I now tender for the inspection of counsel at any convenient time during the course of the trial, the following labor union contract of the Pacific American Fisheries for the years 1937, 1938 and 1939:

Company file No. 47, which is a contract dated July 19, 1938, with the International Machinists' Union, Bellingham Cannery,—

The Court: Would it be convenient for you to take them up according to the years, beginning with those in 1937?

Mr. Carey: I was reading them as the Comptroller listed them, and in some instances, he has indicated the year, and some he has not. We just got them here about ten minutes ago. [101]

Company file 90, which contains a contract dated

May 10, 1939, with the Carpenters & Joiners of America Union, Local No. 1184;

Company file 136, which contains a contract dated May 16, 1939, with the Marine Cooks & Stewards Association;

File 91, which apparently contains several contracts. I find one here dated May 28, 1938, and another one dated May 9, 1939.

These contracts in this file are with the American Radio Telegraphists' Association, and Local No. 6 of the American Communications Association and there may be other contracts in that file. I just notice hardly that there are those two.

File No. 92, this file contains several contracts. I see one for 1938, and another for 1939, and there may be others. These contracts in File 92 are with the International Association of Machinists of Seattle, Local 79 and Local 239.

File 100 contains 1937, 1938 and 1939 contracts with United Fishermen of Alaska, Kodiak Local, account of Alitak Cannery.

File 138 contains a contract dated May 27, 1938, with Alaska Cannery Workers' Union, Local 5, of San Francisco;

File 25 contains a contract relative to the year 1938 between Alaska Packers' Association and certain unions applicable to the Larson Bay and Chignik canneries. For the information of the Court, the reason that that appears in the Pacific American files is because the Alaska Packers and the Pa-

cific American Fisheries had a joint operation [102] there at that particular location in that year.

The Court: That was in the year 1938?

Mr. Carey: That apparently is 1938.

Company file 62 contains a contract dated May 27, 1938. There are two papers in here, both bearing the same date. Whether they are duplicate copies of the same contracts or not, I don't know, but at any rate, the contracts are agreements between the PAF and San Francisco Lodge No. 68 of the IAM for East Bay Union of Machinists, covering Southeastern Alaska and Bering Sea, Alaska. What all that means, I don't know.

File 57—1939 contains a contract with the Alaska Fishermen's Union for that year.

File 57—'38 contains a contract with the Alaska Fishermen's Union for that year, and File 57—1937 contains a contract with the Alaska Fishermen's Union for that year.

The Court: You have just mentioned three files No. 57.

Mr. Carey: Yes.

The Court: One for each of the three years?

Mr. Carey: Yes. That is apparently the way that they kept that particular contract.

File 101-1937. File 101 for the year 1937, which contains a contract with the Cannery Workers and Farm Laborers' Union for that year.

File 101-1. File 101-1 which contains a contract with the Cannery Workers and Farm Laborers' Union for the year 1939.

File 101, which contains a contract with the Cannery [103] Workers and Farm Laborers' Union for the year 1938.

File 36, which contains a contract with the Puget Sound Cannery Workers' Union, or Association, or whatever their proper name may be, for the year 1938.

Judging only from the name, your Honor, I assume that that applies only to Puget Sound, but probably to Alaska, too. Now, I don't know.

The Court: What class of work does it mention?

Mr. Carey: Well, it says, "Puget Sound Cannery Workers' Agreement". Judging from the name, they are cannery employees.

File 35 contains an agreement with the United Fishermen's Union, Puget Sound District, for the year 1938. [104]

The Court: May I suggest, for my convenience in making the ruling as to each one, after you have it identified, I wish you would call to my attention the place where you think that the language is pertinent.

Mr. Winter: Yes, Your Honor.

Mr. Carey: Are you going to continue with the contracts or with Mr. Buschmann's examination?

Mr. Winter: I will continue with Mr. Buschmann's examination.

AUGUST BUSCHMANN

recalled as a witness on behalf of Defendant, having been previously duly sworn, testified further as follows:

Direct Examination

By Mr. Winter:

Q. Mr. Buschmann, when you were testifying yesterday, I think that you stated that the Fact Finding Board for the year 1938, on which you were the representative for the Employers, had under consideration the basic pay, and that you did not consider the board and lodging.

A. I believe I said that we had under consideration basic pay and overtime.

Q. You had under consideration basic pay and overtime?

A. Yes, sir.

Q. Why didn't you consider board and lodging?

A. Why didn't we consider board and lodging?

Q. Yes.

A. Because there wasn't any controversy over board and [105] lodging, because that had always been furnished.

Q. And it was furnished during the year 1937, the year before, which you were considering in arriving at the 1938 agreement?

A. Yes, sir.

Q. You had under consideration, I take it, the outside employees as distinguished from residents of Alaska, is that right?

A. Yes, sir.

Q. Now, isn't it a fact, Mr. Buschmann, that you, as representative of the employers, argued that in fixing the basic pay they must take into consid-

(Testimony of August Buschmann.)

eration the fact that the company was furnishing board and lodging under the contract?

A. Naturally, it has always been taken into consideration, I think, from the time that we first started packing salmon up there, that there is an expense in furnishing board and lodging, but I do not think that there was any particular stress laid on that during these negotiations.

Q. You do not think that there was an particular stress laid on that during these negotiations?

A. No, sir.

Q. But it has always been stressed by the industry, hasn't it, Mr. Buschmann?

Mr. Carey: I object to that. Counsel's statement is exactly contrary to what Mr. Buschmann says. It should not be overlooked that this is Mr. Winter's witness.

The Court: Try to avoid leading the witness, will you?

Mr. Winter: Yes.

Q. (Mr. Winter, continuing): Mr. Buschmann, by the way, you are [106] a director of the Pacific American Fisheries, aren't you? A. No, sir.

Q. You are of the other company——

A. Of the Alaska Pacific Salmon Company.

Q. Of the Alaska Pacific Salmon Company?

A. Yes, sir.

Q. Do you hold any other office in that corporation—executive office? A. No.

Q. You are a director at the present time?

A. Yes.

(Testimony of August Buschmann.)

Q. And you were in 1937, 1938 and 1939, were you?

A. Yes.

Q. Before that time, did you represent the corporation in negotiations with unions?

A. Not the corporation. We had a general committee, called the Labor Negotiating Committee, that I worked on for a number of years—for two or three years.

Q. But as I understand you, in arriving at the cash remuneration, of course, the furnishing of board and lodging must be taken into account. Now, why do you say that?

Mr. Carey: Just a minute. I object to that upon the ground that it is leading, and it is a misstatement of the witness' evidence, if he is referring to these 1938 negotiations.

The Court: I think that you should just state the objection. Mr. Carey objects to it on the ground that it is leading, and I think that that objection should be sustained. Avoid leading the witness.

[107]

Q. (Mr. Winter): Why do you say—if I understand you, why do you say that you must take into consideration board and lodging—I will strike that. Why must you take into account board and lodging in arriving at the basic pay?

Mr. Carey: I object to that on the ground that he made no such statement.

The Court: Objection sustained.

Q. (Mr. Winter): Well, did you take into con-

(Testimony of August Buschmann.)

sideration board and lodging in arriving at the basic pay?

Mr. Carey: I object to that upon the ground that it is repetition. He has already covered the subject.

The Court: Objection overruled.

A. Will you state the question again?

Q. (Mr. Winter): Did you take into account, or, rather, did the Fact Finding Board take into account board and lodging in arriving at the basic pay?

A. As I have stated before, the board and lodging did not come up during those negotiations, because it was not in controversy.

Q. Why wasn't it in controversy?

Mr. Carey: I object to that.

A. Because it has always been furnished.

Q. Because it has always been furnished?

A. Yes, sir.

Mr. Carey: I am objecting to it, about putting in controversy something over which there was no controversy.

The Court: Objection overruled.

Q. (Mr. Winter): Was it understood by the Board that board and lodging would continue to be furnished? [108]

Mr. Carey: I object to that as immaterial.

The Court: No, that objection is overruled. The objection as made is overruled.

A. Will you state that question again?

(Testimony of August Buschmann.)

The Court: Will you read the question, Mr. Reporter?

(Question read.)

A. Yes, sir; it was understood that it was to be continued.

Mr. Winter: I think that that is all.

Cross Examination

By Mr. Carey:

Q. Now, Mr. Buschmann, this board held its sessions during the summer of 1938, after the men had gone to Alaska to start their work?

A. Yes.

Q. That Board came into existence by reason of the fact that before the men went to Alaska in 1938, the operators contended that the marketing conditions with reference to the 1937 pack was such that the operators could not pay the same rate of compensation in 1938 as had been previously paid in 1937?

A. That is right.

Q. And the operators asked for a material reduction in the wages?

A. Yes.

Q. And the Unions countered by asking for a material increase in the wages?

A. Yes.

Q. And that was the situation that existed in the spring when the time had arrived that the operation had to start, [109] if there was going to be any operation at all?

A. That is true.

Q. And the Unions and the Operators attempted to arrive at a settlement by negotiation between themselves, and were not able to do so?

(Testimony of August Buschmann.)

A. That is right.

Q. And then, in order to permit the operation to go on, an arrangement was made that the men would go to Alaska on the terms offered by the Operators, subject, however, to such ruling as should afterwards be made by this Board? A. Yes.

Q. Now, the Board was created, or the Board consisted of three, one man representing the industry, and that was yourself? A. Yes.

Q. That is right, isn't it?

A. That is right, yes, sir.

Q. One man representing Labor, and that was Mr. Melnikow?

A. One man representing Labor, yes, and that was Mr. Melnikow.

Q. And then you were at a stalemate, so to speak, for a considerable time as to how to appoint the third man. Now, isn't it a fact that in an attempt to create a board of three who would investigate and make a decision, that it was finally agreed that Judge Garrecht of the Circuit Court of Appeals would name three men?

A. I think that that is correct.

Q. And Judge Garrecht named as possible candidates, Ben Kizer, of Spokane, Mr. Smith of San Francisco, and a third man whose name I do not remember. [110]

A. I do not remember it, either.

Q. And then having Judge Garrecht's nominees before you, you rejected one, and Mr. Melnikow rejected the other, and that left Mr. Smith, and

(Testimony of August Buschmann.)

he automatically became the third member of the Board? A. Yes, that is true.

Q. And then you held your sessions along in July or August of 1938? A. Yes.

Q. The operations then being in progress in Alaska? A. Yes.

Q. And finally made your award? A. Yes.

Q. The net result was that the increases asked by the Union were not granted. There were no increases over 1937 granted?

Mr. Winter: We will object to that, if the Court please, on the ground that the award is the best evidence. I make the same objection that has been made by counsel on a number of times.

Mr. Carey: All right, if counsel is willing to stand on that proposition, that was the one that I was making all day yesterday. He did not want—

The Court (Interrupting): The objection is overruled.

Q. (Mr. Carey): The net result was that while the operators were asking for a reduction under 1937 of approximately 25 per cent., the Board awarded about 5 per cent. in all districts except Southeastern Alaska, and about 7 per cent. in Southeastern Alaska? A. That is right. [111]

Q. And while you signed the agreement, or the award, in order to make it unanimous, you personally registered your objection to that?

A. I did.

Q. And on the other hand—I am sorry, but I do not seem to remember that other gentleman's

(Testimony of August Buschmann.)

name—Mr. Melnikow, he also signed the award, but on behalf of the Unions, he registered a protest, saying that individually he did not agree to it. That was the situation, was it not?

A. Yes, sir.

Q. Then the result was that Mr. Smith, the third man who was on the Board, by reason of Judge Garrecht's nomination, he became chairman, and he wrote the report, and you all signed it, isn't that right?

A. Yes, sir.

Q. And then when the men got back after the end of the season, a settlement was made upon the basis of this award?

A. That is right.

Q. Now, in considering this matter, the matter that was a matter of controversy between the operators and the Unions before the season started was the matter of how much cash wages should be paid?

A. Wages and overtime was the controversy.

Q. Well, overtime is wages, isn't it?

A. Yes.

Q. Paid in cash?

A. Yes.

Q. Isn't it a fact, Mr. Buschmann, that in the course of these negotiations, the matter of furnishing board and lodging was never a matter of controversy—never a matter of [112] controversy; that board and lodging always had been furnished, and you just took it for granted that it would continue to be furnished?

A. That is right.

(Testimony of August Buschmann.)

Q. That was not a matter of discussion or argument at all, was it?

A. No. We might have discussed it, but it was no matter of argument, and the agreements that were drawn up provided for it.

Q. There never was any controversy about that subject? A. No.

Mr. Carey: That is all.

Redirect Examination

By Mr. Winter:

Q. There have been controversies from time to time, have there not, as to, shall I say, the grade of food to be furnished?

A. Yes, there have been.

Q. Yes.

A. In years past. Naturally, the Unions would contend for better food as they went along.

Q. Yes.

A. Which, in most cases, was granted.

Q. And also better lodging and better accommodations? A. Yes, sir.

Q. And furnishing other things in addition to food and lodging? A. Yes.

Q. Is that right? A. Yes, sir. [113]

Q. Now, Mr. Buschmann, I think that you have been connected with the salmon canning industry for a good many years? A. Yes.

Q. For how many years, would you say?

A. Oh, about 45 years.

Q. Are you familiar with the base upon which liability insurance is computed?

Mr. Carey: I object to that as immaterial.

(Testimony of August Buschmann.)

Q. (Continuing) Particularly with your companies.

The Court: Sustained.

Mr. Winter: I would like to ask this as direct examination, if your Honor please, because I forgot to ask this before, if your Honor please.

The Court: Then you wish to open your direct examination?

Mr. Winter: Yes, I would like to do so.

The Court: That will be permitted, and I will allow you, Mr. Carey, the opportunity to cross examine. Objection is overruled. The witness may answer the question.

Mr. Winter: I will reframe my question, and amplify it somewhat.

Q. (Mr. Winter, continuing) I will ask your whether or not the reasonable value of board and lodging is included in the amount of wages and salary, where you are computing the premium to be paid for liability insurance?

Mr. Carey: I object to that as immaterial. The question as to what may happen between a particular operator and some particular insurance company as a matter of contract [114] between them is one thing. What is proper as a matter of law is an entirely different thing.

The Court: Unless the question is confined to these two plaintiffs, the objection will be sustained.

Mr. Winter: Well, I will confine it to either the Pacific American Fisheries or the Alaska Pacific Salmon Company.

(Testimony of August Buschmann.)

Mr. Carey: So far as the Pacific American Fisheries is concerned, there is no evidence that this witness has any connection, or ever did have any official connection with the Pacific American Fisheries, or that he has any knowledge on the subject.

Mr. Winter: Well, I will limit it to his company, then.

Q. (Mr. Winter) Well, just limit it to your company, Mr. Buschmann.

Mr. Carey: As yet, there is no evidence that even as to the Alaska Pacific Salmon Company he has any knowledge on the subject.

The Court: Will you read the question, Mr. Reporter?

(Question read.)

The Court: If you know the answer to that question, you may give it.

A. You mean as regards the Alaska Pacific Salmon Company?

Q. (Mr. Winter) Yes.

A. I know nothing about that, as regards to the Alaska Pacific Salmon Company.

Q. Well, with regard to the other company, the Pacific American Fisheries?

A. I know nothing with reference to the other company, either. [115]

Q. You know nothing in that regard with respect to either company? A. No, I do not.

Mr. Winter: That is all.

Mr. Carey: That is all.

(Witness excused.)

WILLIAM HECKER

called as a witness on behalf of the Defendant, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Winter:

Q. Will you state your name?

A. William Hecker.

Q. Where do you reside?

A. 903 Union Street, Seattle.

Q. Are you, or were you connected with the Alaska Fishermen's Union during the years 1937, 1938 or 1939?

A. I have been the Business Agent of the Alaska Fishermen's Union since April of 1938.

Mr. Carey: Since April of 1938?

The Witness: Since April of 1938, yes, sir.

Q. (Mr. Winter) Were you connected with the Alaska Fishermen's Union prior to that time?

A. Just as a member.

Q. Just as a member? A. Yes, sir. [116]

Q. How long have you been a member of the Alaska Fishermen's Union? A. Since 1922.

Q. Are you familiar with the—I will strike that.

The Court: Have you conducted any other business around town here?

The Witness: Not in Seattle. I used to be a seaman. I used to sail as an officer and master of ships.

Q. (Mr. Winter) As business agent for the Alaska Fishermen's Union, did you take part in

(Testimony of William Hecker.)

negotiations looking forward to the execution of contracts with canneries in Alaska?

A. Negotiations were carried on by a committee, and I was a chairman of the committee on behalf of the Union.

Q. Did you sign the contracts for 1938 and 1939?

A. Yes.

Q. With the Alaska Pacific Salmon Company?

A. Yes.

Q. And also with the Pacific American Fisheries? A. Yes, sir.

Q. I will ask you whether or not you, as business agent, or as representative, or as bargaining agent—you are the bargaining agent for the employees, aren't you——

A. (Interrupting) Yes, sir.

Q. (Continuing) ——considered board and lodging as a part of the wages to be paid under those union contracts?

Mr. Carey: Just a minute. I object to that as immaterial. The negotiations, of course, were merged in the written agreements, and they are the best evidence. If counsel has them, they will be offered in evidence, if they are material. It is not proper to undertake to ask the [117] witness about the meaning of a contract which is not yet in evidence, even if it might be proper afterwards.

The Court: Read the question.

(Question read.)

The Court: Objection sustained.

(Testimony of William Hecker.)

Q. (Mr. Winter) During negotiations with the Alaska Pacific Salmon Company and the Pacific American Fisheries, or their representatives, was the matter of board and lodging discussed between you as representing the Union——

A. (Interrupting) The negotiations were——

Mr. Carey: (Interrupting) Just a minute. That is objected to for the reason that the negotiations were merged in the written contracts, which are the best evidence.

And it is incompetent to examine any witness about the negotiations of any particular contract—— at least prior to the time that the contract is offered in evidence.

The Court: My offhand opinion is that Mr. Carey's objection is tenable and sound. I will hear you, however, if you have any authority which you think permits the question.

Mr. Winter: If the Court please, this is my thought in the matter, Counsel says and the witnesses say that it was either a verbal understanding or it was merged in the written contract. Now, the contract may be ambiguous in that respect, and I am just trying——

The Court: (Interrupting) I am having more trouble with your question, as to whether or not it may be ambiguous. If the purpose of the question is to bring before the Court by oral testimony the contents of the discussion, or the terms of the discussion, I think that the objection [118] should be sustained. If all that is asked for is merely whether

(Testimony of William Hecker.)

or not a discussion took place, that might be another thing.

An answer to the question which would be admissible would be "yes" or "no".

Mr. Winter: I will withdraw the question.

The Court: Just wait a minute. Let us see. Read the question.

(Question read.)

Mr. Winter: I would like to reframe the question.

The Court: You may do so.

Q. (Mr. Winter) During your negotiations looking forward to the execution of agreements with the Plaintiffs here, was the matter of board and lodging discussion between you and the representatives of the companies?

The Court: The answer to that question will be "yes" or "no".

A. Yes.

Q. (Mr. Winter) It was discussed?

A. Yes.

Q. Would you say that that was discussed many times?

Mr. Carey: I object to that as leading.

The Court: The objection is sustained.

Q. (Mr. Winter) Over what period of time did your negotiations take?

Mr. Carey: That is objected to as immaterial. Negotiations, whether long or short, if they resulted in a contract, it is the contract then that is involved, and that would be immaterial.

(Testimony of William Hecker.)

The Court: The objection is overruled. He may state. [119]

A. Negotiations were carried on over several months—probably three or four months.

Q. (Mr. Winter, continuing) What is the fact as to whether or not that matter was discussed on numerous occasions or on just a few occasions?

A. On numerous occasions.

Q. And did you fix a value as between yourselves on the matter of board and room?

Mr. Carey: I object to that as immaterial, for the reasons previously stated. Now, that is going into what ultimately went into the contract, and the contract is the best evidence.

The Court: I will have to sustain this objection and it is the order of the Court that it will be sustained.

Q. (Mr. Winter, continuing) Do you know of your own knowledge whether or not board and room have been furnished to fishermen?

A. They always have. It is furnished to some, and there are some that it is not furnished to. There are different classifications of fishermen in Alaska.

Q. Yes.

A. And some of them do not get their board, but they get more money for the fish.

Q. Yes.

A. And more money for their labor.

Q. I see. Were you fishing, or were you employed in Alaska working for either one of these companies during 1937?

(Testimony of William Hecker.)

A. No. I was fishing for the Alaska Packers' Association out of San Francisco.

Q. Out of San Francisco?

A. Yes. [120] I was fishing in the Bristol Bay District.

Q. Are you familiar with the board and room, or the provisions for board and room that were furnished to the employees of the Alaska Pacific Salmon Company and the Pacific American Fisheries Company during either 1937, 1938 or 1939?

A. Just what do you mean by that? The kind of board that they got?

Q. What is that?

A. What do you mean, the quality of the board?

Q. Yes.

A. Well, I think that the quality of the board runs about the same for every company in the various districts—I mean, that they feed them all alike.

Mr. Carey: I do not think that that is in issue in this case, your Honor. Even if the meals were not good last year, I do not know what the Court can do about it.

Mr. Winter: That is all.

Mr. Carey: That is all.

(Witness excused.) [121]

The Court: You may proceed.

Mr. Winter: We will call Mr. Espe.

CONRAD ESPE,

called as a witness on behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Winter:

Q. Will you state your name, please?

A. Conrad Espe.

Q. Where do you reside, Mr. Espe?

A. 820 North 60th, Seattle.

Q. What is your occupation?

A. I am International Vice-President of the United Cannery, Agricultural, Packing and Allied Workers of America, and Business Agent of its Local Branch No. 7.

Q. You are the Business Agent of what branch?

A. Branch No. 7 here in Seattle.

Q. How long have you occupied that position?

A. As Business Agent I occupied in 1936 and in 1937, and I occupied it in 1940, '41 and '42.

Q. Have you had occasion, or what has been your experience with respect to collective bargaining agreements? Have you had considerable experience along that line?

A. I have been the Chairman of the Collective Bargaining Committee for the Cannery Workers for the whole Coast that worked in Alaska since 1936.

Q. And I take it that you personally have been negotiating [122] for these Union contracts during that period of time?

(Testimony of Conrad Espe.)

A. From 1936 up to the present date.

Q. Are you familiar with what contracts or, rather, are you familiar with all the contracts in your Union which were executed in 1937?

A. I am.

Q. Will you state to the Court how the contracts are negotiated?

Mr. Carey: I object to that.

Q. (By Mr. Winter) How does the Union negotiate contracts with the industry?

Mr. Carey: That is objected to.

Mr. Winter: That is purely preliminary, if Your Honor please.

Mr. Carey: I object to that as immaterial. I make the same objection that I made when Mr. Hecker was on the stand.

The Court: It is not necessary to take up the time on that. I think I will sustain the objection. You should get right at the pertinent inquiry.

Q. (By Mr. Winter) How are the contracts negotiated?

Mr. Carey: That is the same question, and I object on the same ground.

The Court: Objection sustained.

Q. (By Winter) Is the price paid for labor the same to a resident of Alaska as it is to a non-resident, for example on ships or boats? [123]

Mr. Carey: I object to that. The contract is the best evidence. The objection is that it is immaterial to any issue in this case.

(Testimony of Conrad Espe.)

The Court: Objection overruled. The answer to that question should be yes or no.

Q. (By Mr. Winter) Is there a difference?

A. Yes, there is.

Q. What is the difference, Mr. Espe?

Mr. Carey: That is objected to upon the ground that it is already shown that these arrangements are in the form of written contracts, and the contracts are the best evidence.

The Court: I think that that objection will have to be sustained.

Q. (By Mr. Winter) Well, I will ask you, Mr. Espe, is the furnishing of board and lodging given any consideration in fixing the terms of employment?

A. Yes.

Mr. Carey: I move to strike the answer because it was made before I had a chance to make an objection.

The Court: The motion and the objection will be considered together.

Mr. Carey: All right. I object upon the ground that the contract is the best evidence.

The Court: Read the question.

(Question read by the reporter.)

Mr. Carey: The negotiations are, of course, merged in the written contract, and the contract is [124] the best evidence.

The Court: That objection is sustained.

Q. (By Mr. Winter) That is your Union uses the same form of contract with every cannery in Alaska, or did it in 1937?

A. Yes.

(Testimony of Conrad Espe.)

Q. Was there any difference between the contracts that were executed with the Alaska Pacific Salmon Company than there were with the contracts that were executed with the Pacific American Fisheries?

Mr. Carey: I object to that as immaterial. The contracts, if material, are the best evidence to show whether they are alike or unlike.

Mr. Winter: If the Court please, counsel stated himself that these are the only contracts which are in existence, and we want to know whether they are the same contracts with both corporations, which the evidence will show, we think, that they are, and when we get all these contracts in there will be some in some years with one company and some in other years with another company. I want to know if the same form was used.

The Court: You are inquiring with special reference to these two companies?

Mr. Winter: Yes.

The Court: Contracts which are not available?

Mr. Winter: Yes, your Honor.

Mr. Carey: Well, I do not know the purpose of the inquiry. If the purpose of the inquiry is to suggest [125] to the Court that there are contracts that we have not produced here, all I have to say is that I have produced all that I could get, and it is not my fault that counsel did not make a timely request for them. We have produced all that we were told were available. Now, if he will tell me

(Testimony of Conrad Espe.)

that there is some contract that is not here, I will ascertain whether there is such a contract.

The Court: Objection sustained. You may advise counsel as to further contracts you wish him to produce, and then after that the Court will consider again your propounding this question, if you wish to propound this question after that subject is gone into.

Mr. Winter: Well, we will make a demand at this time, if the Court please, for counsel to produce all written contracts that they had with Labor in the canneries during the years 1937, 1938 and 1939. We do not have them. Counsel's own statement was that they are not available, and that they have produced the only set of contracts that were available. That was his statement yesterday. Now, if there are any others, we would like to have them. We do not want it argued later on that they may not have had contracts with some other parties.

The Court: Did he say that with reference to these two Plaintiffs, or with reference to other employers? Does your present inquiry and demand relate to any contract between other employers and their employees, or do they relate only to these two Plaintiffs and their employees? [126]

Mr. Winter: To these two Plaintiffs and their employees. Mr. Carey said that these were all the contracts which were available—that it was the complete set—all that he had, and we want produced all written contracts had by these two Plaintiffs with

(Testimony of Conrad Espe.)

Labor in the canneries during the years 1937, 1938 and 1939.

The Court: I understood in response to that request that he produced all these contracts, all that he could find as to these two Plaintiff employers for the years 1937, 1938 and 1939. Did I understand you correctly, Mr. Carey?

Mr. Carey: Yes.

The Court: What contract are you inquiring about in this question that you last propounded to the witness?

Mr. Winter: Well, I have no particular contract in mind, but there may appear, for example, as I pointed out to Your Honor that we have numbered these exhibits in accordance with the——

The Court: (Interruptnig) If you wish me to consider the question as renewed now and if counsel for the Plaintiffs wishes me to consider his objection to the question as renewed, the Court will rule on it.

Mr. Winter: Yes, Your Honor.

Mr. Carey: I may misunderstand what counsel is driving at. If he is making a demand on me for the production of any contracts in addition to those that I have already furnished him for his inspection, all I can say is that I haven't any more, because I have given him everything that I can get hold of. [127]

The Court: That situation has been already passed. Since you have again reminded the Court, and all has been said or done, he then wishes to repeat to the witness the question as to the similarity

(Testimony of Conrad Espe.)

of the contracts. Do you wish to have the question read?

Mr. Carey: No. I have it in mind, and I object to it.

The Court: Objection sustained.

Q. (By Mr. Winter) Mr. Espe, who prepared the contracts which your Union had with the Alaska Pacific Salmon Company and the Pacific American Fisheries, Inc.?

Mr. Carey: That is objected to as immaterial, who may have prepared them. It doesn't make an difference who prepared them. When finally executed those are the contracts.

The Court: What do you seek to show by this, and what foundation are you laying, if any?

Mr. Winter: I am laying the foundation to show that the same form was used with both companies, and if it later appears that a contract is missing, it won't be charged that we did not produce it or that we did not ask them to produce it or have demand made upon them for it.

The Court: I do not believe that that will be of any help to anyone of you in this court. [128]

STIPULATION OF COUNSEL RE LABOR
CONTRACTS OFFERED AND ADMITTED
AS EXHIBITS

The files of the plaintiffs, Pacific American Fisheries, Inc. and Alaska Pacific Salmon Company ten-

dered to counsel for defendant for inspection as shown above were given appropriate exhibit numbers and offered and admitted in evidence except as noted below. Said contracts are numerous and voluminous, contain provisions covering many subjects not material, and it is agreed that the provisions of said contracts insofar as material are as follows:

1. Exhibit A-1 is a contract between Pacific American Fisheries, Inc., and Alaska Fisheremans Union, covering seamen, fishermen and others employed at Nornak, in the year 1939, and among other general and specific provisions for the furnishing of lodging and subsistence, in addition to provisions for cash remuneration to be paid by the employer to its employees, it provides:

“There shall be regular meal hours posted on vessel or cannery, such meal hours shall be observed and for all work done during meal hours extra compensation shall be paid at the rate of One Dollar per hour. This rule also applies for the meal to be served at midnight as hereinafter provided. Men required to work before and after midnight shall receive a hot lunch. Above section applies to men working only.”

2. Exhibit A-2 is a file containing seven 1937 contracts between Alaska Pacific Salmon Company and various unions:

(1) Is a contract between Alaska Pacific Salmon Company and Alaska Fishermens Union, covering tendermen, trapmen, mess house employees and others in southeastern Alaska canneries, and among other general and

specific provisions for the furnishing of lodging and subsistence, in addition to [129] provisions for cash remuneration to be paid by the employer to its employees, it provides:

“Fresh meat, fruits and vegetables shall be furnished whenever obtainable.

* * * *

“Men arriving from Alaska on Company vessel at a port of destination other than Seattle or Bellingham shall receive at that destination in addition to their agreed pay, transportation to Seattle or Bellingham and \$3.00 per day for maintenance while waiting for transportation. Transportation and maintenance shall not be required to be furnished to men who have shipped in the same United States Custom District as the port of destination.

* * * *

“The mess house crew shall prepare and serve the three regular meals each day. During the canning season if coffee is served at other than regular meal hours, the mess house crew shall prepare same without overtime. If, at midnight any cook is required by the Superintendent, foreman of Captain in charge to prepare and serve an additional full hot meal for members of the crew working at night, he shall receive three hours' overtime.”

(2) Is a contract between Alaska Pacific Salmon Company and Cannery Workers and Farm

Laborers Union, Local 18257, Seattle, Washington. and among other general and specific provisions for the furnishing of lodging and subsistence, in addition to provisions for cash remuneration to be paid by the employer to its employees, it provides:

“Sufficient food of a diversified character shall be furnished, and wholesome meals of good quality and sufficient quantity shall be available at all meals.

* * * *

“In canneries and on vessels, each bed shall consist of spring mattress, pillow and cover two white sheets, and sufficient blankets to be furnished by the company, upon the request of the members.

“Mosquito netting shall be furnished where required, and screens for doors and windows.

[130]

“Linens to be changed weekly, and laundered by the Company.

“Bunk houses shall be apart from mess room, wherever practical.

“Bunk houses, to best serve their particular use, shall be made as sound proof as possible, to ensure a sound sleep for men.

“Good lighting facilities shall be made available wherever needed, for reading, writing, and recreational purposes, and all wires encased in conduit.”

* * * *

(3) Is a contract between Alaska Pacific Salmon Company and Copper River and Prince Will-

iam Sound Fishermens Union, covering tendermen, trapmen and mess house employees and others employed in Prince William Sound canneries, and in form is identical with (1).

(4) Is a contract between Alaska Pacific Salmon Company and American Radio Telegraphists Association, and among other general and specific provisions for the furnishing of lodging and subsistence, in addition to provision for cash remuneration to be paid by the employer to its employees, it provides:

“In addition to salary the company agrees to furnish suitable and habitable living quarters and wholesome meals of good quality and sufficient quantity to each radio operator employed by the company.”

(5) Is a contract between Alaska Pacific Salmon Company and Copper River and Prince William Sound Fishermens Union, covering fishermen employed in that district, and among other general and specific provisions for the furnishing of lodging and subsistence, in addition to provisions for cash remuneration to be paid by the employer to its employees, it provides: [131]

“The first party (the company) agrees to furnish free to men using company boats, oil, gas, fuel and fishnets, and in addition will furnish food up to the value of \$45.00 per man for the season on the Copper River Deltas. All food used in excess of \$45.00 per man shall be charged to and deducted from their respective accounts.”

“In the event party of the second part is used as a common laborer around the plant prior to and after the fishing season, he shall receive wages at the rate of \$90.00 per month and board for time worked.”

(6) Is a contract between Alaska Pacific Salmon Company and United Brotherhood of Carpenters and Joiners of America, Local 1184, and among other general and specific provisions for the furnishing of lodging and subsistence, in addition to provisions for cash remuneration to be paid by the employer to its employees, it provides:

“The rate of pay based on the above hours shall be One Hundred and Seventy Dollars (\$170.00) per month, with board, lodging and transportation furnished in addition.”

(7) Is a contract between Alaska Pacific Salmon Company and Alaska Fishermens Union, covering tendermen, fishermen and others employed in the Westward Canneries. So far as material, this contract is substantially identical with (1).

3. Exhibit A-3 is a file containing six contracts between Alaska Pacific Salmon Company and various unions, covering the year 1938:

(1) Is a contract between Alaska Pacific Salmon Company and Alaska Fishermens Union, covering tendermen, trapmen and others employed in southeastern Alaska, and so far as material, this contract is substantially identical to Exhibit A-2 (1).

(2) Is a contract between Alaska Pacific [132] Salmon Company and Cannery Workers and Farm Laborers Union, Local No. 7, and among other general and specific provisions for the furnishing of lodging and subsistence, in addition to provisions for cash remuneration to be paid by the employer to its employees, it provides:

“* * * The Company shall also furnish employee free transportation of third class, from port of embarkation to the cannery and return; except as herein otherwise provided; three wholesome and adequate meals each day during transportation and while at the cannery; also suitable living quarters while at the cannery and bunk, spring and mattress, * * *”

(3) Not admitted in evidence.

(4) Is a contract between Alaska Pacific Salmon Company and American Radio Telegraphists Association, and so far as material, this contract is substantially identical with Exhibit A-2 (4).

(5) Not admitted in evidence.

(6) Is a contract between Alaska Pacific Salmon Company and Seattle District Counsel of Carpenters, and among other general and specific provisions for the furnishing of lodging and subsistence, in addition to provisions for cash remuneration to be paid by the employer to its employees, it provides:

“The rate of pay based on above hours shall

be \$150.00 per month with board, lodging and transportation furnished in addition."

(7) Is a contract between Alaska Pacific Salmon Company and Alaska Fishermens Union, covering tendermen, trapmen, mess house employees and others, and so far as material, this contract is substantially identical with Exhibit A-2 (1). [133]

(8) Is a contract between Alaska Pacific Salmon Company and Machinists Local No. 79 and No. 239 of the International Association of Machinists, and among other general and specific provisions for the furnishing of lodging and subsistence, in addition to provisions for cash remuneration to be paid by the employer to its employees, it provides:

"One hour shall be allowed for all regular meals except during the height of the canning season. The limits of meal hours shall be:

Breakfast	6 to 8 A.M.,
Dinner	11 A.M. to 1 P.M.,
Supper	5 to 7 P.M.,

except where mutually agreed. Men at the cannery required to work until midnight shall receive hot coffee and lunch. Men who continue to work after midnight shall receive a hot meal at the mess house."

4. Exhibit A-4 is a file containing six 1939 contracts between Alaska Pacific Salmon Company and various unions:

(1) Is a contract between Alaska Pacific Salmon Company and Alaska Fishermens Union, covering tendermen, trapmen and others employed in southeastern Alaska, and is substantially identical with the corresponding contract for the two preceding years.

(2) Is a contract between Alaska Pacific Salmon Company and United Cannery Agricultural Packing and Allied Workers of America, and so far as material, this contract is substantially identical with Exhibit A-3 (2).

(3) Not admitted in evidence.

(4) Is a contract between Alaska Pacific Salmon Company and American Communications Association, and so far as material, this contract [134] is substantially identical with the contracts in the two preceding years.

(5) Not admitted in evidence.

(6) Is a contract between Alaska Pacific Salmon Company and Seattle District Council of Carpenters, and so far as material, this contract is substantially identical with Exhibit A-3 (6).

(7) Is a contract between Alaska Pacific Salmon Company and Alaska Fishermens Union, covering tendermen, trapmen, mess house employees and others employed in the Westward Cannery, and so far as is material,

this contract is substantially identical with the contracts covering the preceding years.

(8) Is a contract between Alaska Pacific Salmon Company and Machinists Local 79 of International Association of Machinists, and among other general and specific provisions for the furnishing of lodging and subsistence, in addition to provisions for cash remuneration to be paid by the employer to its employees, it provides:

“During the operation of the cannery, provision shall be made to keep the general crew quarters ashore clean, make fires when necessary and to keep said quarters in a sanitary condition.

* * * *

“One hour shall be allowed for all meals except during the height of the canning season.”

5. Exhibit A-5 was not admitted in evidence.

6. Exhibit A-6 is a blank 1937 form of contract of the Cannery Workers and Farm Laborers Union, Local 18257, being the same form as Exhibit A-2 (2).

7. Exhibit A-7 is a file containing five 1937 contracts between Pacific American Fisheries, Inc., and Alaska Fishermens Union, covering operations at Alitak, Petersburg, [135] Chignik, Karluk, Kasaan, King Cove, and Bristol Bay canneries, Naknek, Nushagak and Nornek, and also Shumagin, which form of contracts, insofar as material, are identical with Exhibit A-2 (1).

(6) Is a contract between Alaska Fishermens Union and Western Pacific Packing Company, covering seamen, fishermen and others for the year 1937.

8. Exhibit A-8 was not admitted in evidence.

9. Exhibit A-9 is a file containing 1939 contracts between the Pacific American Fisheries and Seattle District Counsel of Carpenters, Local 1184, being identical in form with Exhibit A-2 (6); a contract between Pacific American Fisheries and American Communications Association, being identical in form with Exhibit A-4 (4), and a contract between Pacific American Fisheries, Inc., and Seattle District Counsel of Carpenters, being identical in form with Exhibit A-4 (7).

10. Exhibit A-10 contains 1938 contract between Pacific American Fisheries and Marine Cooks etc.; also 1937 contract with same union. This file is not material because these contracts relate not to cannery employees, but to crews of company vessels.

11. Exhibit A-11 is a file containing 1938 contracts between Pacific American Fisheries and American Radio Telegraphists Association, and a 1939 contract between Pacific American Fisheries and American Communications Association, and insofar as material, these contracts are identical in form with contracts between the same Unions and Alaska Pacific Salmon Company for the same years, being Exhibits A-3 (4) and A-4 (4).

12. Exhibit A-12 is a file containing 1938 Ali-tak contract between Pacific American Fisheries

and Cannery [136] Workers and Farm Laborers Union (duplicate copies); also Naknek 1938 contract between Pacific American Fisheries and Cannery Workers and Farm Laborers Union, Local 226; also 1938 Nornek contract between Pacific American Fisheries and Cannery Workers and Farm Laborers Union, Local No. 7 (duplicate copies); also contract in the same form covering Shumagin Cannery, and insofar as material, these contracts are identical with similar contracts between the Alaska Pacific Salmon Company and the same Unions.

13. Exhibit A-13 is a file containing a 1938 contract between Pacific American Fisheries and Alaska Cannery Workers Union, Local 5, San Francisco, covering operations at Karluk and Chignik, and insofar as material, the contract is identical to corresponding contract with the Alaska Pacific Salmon Company.

14. Exhibit A-14 is a file containing 1938 contracts between Pacific American Fisheries and Alaska Fishermens Union, covering operations at Chignik, Karluk, King Cove, Nornek, Naknek, Petersburg and Shumagin, also Alitak, and insofar as material, these contracts are identical with corresponding contracts for prior year and/or with Alaska Pacific Salmon Company.

15. Exhibit A-15 is a file containing 1938 and 1939 contracts between Pacific American Fisheries and International Association of Machinists, Local 79, and insofar as material, these contracts are

identical with the contracts between that Union and the Alaska Pacific Salmon Company.

16. Exhibit A-16 is a file containing a 1938 contract between Pacific American Fisheries and International Association of Machinists, Local No. 68, and insofar as material, this contract is identical with the similar contract between Alaska Pacific Canning Company and the International Association of Machinists. [137]

17. Exhibit A-17 is a file containing 1939 contracts between Pacific American Fisheries and Alaska Fishermens Union, covering operations at Alitak, King Cove, Naknek, Nornek, Shumagin, Port Moller and Nushagek, and insofar as material, these contracts are identical with similar contracts in previous years and between the Alaska Pacific Salmon Company and that Union.

18. Exhibit A-18 is a file containing 1939 contract between Pacific American Fisheries and Cannery Workers and Farm Laborers Union No. 7, covering operations at Alitak, also Port Moller, also Shumagin, and insofar as material, the contract is identical to similar contract in prior years and between the Alaska Pacific Salmon Company and that Union.

KERR, McCORD AND CAREY
STEPHEN V. CAREY

Pacific American Fisheries,
Inc., Attorneys for Appel-
lant.

KERR, McCORD AND CAREY
STEPHEN V. CAREY

Alaska Pacific Salmon Com-
pany, Attorneys for Ap-
plant.

J. CHAS. DENNIS

United States Attorney

THOMAS R. WINTER

Special Assistant to the Chief
Counsel, Bureau of Inter-
nal Revenue

Attorneys for Appellee.

[Endorsed]: Filed Mar. 23, 1943. [138]

[Endorsed]: No. 10395. United States Circuit Court of Appeals for the Ninth Circuit. Pacific American Fisheries, Inc., a corporation, Appellant, vs. United States of America, Appellee, and Alaska Pacific Salmon Company, a corporation, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeals from the District Court of the United States for the Western District of Washington, Northern Division.

Filed: March 29, 1943.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of
Appeals for the Ninth Circuit.

United States Circuit Court of Appeals
For the Ninth Circuit

No. 10395

PACIFIC AMERICAN FISHERIES, INC.,
Plaintiff and Appellant,

vs.

UNITED STATES OF AMERICA
Defendant and Appellee.

No. 10395

ALASKA PACIFIC SALMON CO.,
Plaintiff and Appellant,

vs.

UNITED STATES OF AMERICA
Defendant and Appellee.

DESIGNATION UNDER RULE 19-6

To the Clerk of the Above Entitled Court:—

Pursuant to Rule 19-6, the appellants state that the point upon which they intend to rely on their appeal from the judgment of the United States District Court for the Western District of Washington, Northern Division is that the proof made on the trial does not support the findings, conclusions and judgment entered in said causes 396 and 397 as numbered

in the Court below, but on the contrary the admissions in the pleadings and the proof require judgments in favor of the plaintiffs as prayed for in their respective complaints.

The appellants therefore designate for printing the entire record as certified and transmitted by the Clerk of said District Court.

KERR, McCORD AND CAREY
STEPHEN V. CAREY

Attorneys for Pacific American
Fisheries, Inc. and
Alaska Pacific Salmon Co.,
Appellants.

Service of the foregoing designation by receipt of copy thereof admitted this 26th day of March, 1943.

U. S. District Attorney
Attorneys for Defendant and
Appellee

Copy received this 26th day of March, 1943.

THOMAS R. WINTER
M.O.

[Endorsed]: Filed Mar. 29, 1943. Paul P.
O'Brien, Clerk.

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

PACIFIC AMERICAN FISHERIES, INC., a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA, *Appellee.*

—and—

ALASKA PACIFIC SALMON COMPANY, a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA, *Appellee.*

UPON APPEALS FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT OF
WASHINGTON. NORTHERN DIVISION
HON. JOHN C. BOWEN, *U. S. District Judge*

OPENING BRIEF OF APPELLANTS

KERR, MCCORD & CAREY

STEPHEN V. CAREY

Attorneys for Appellants,

*Pacific American Fisheries,
Inc., a corporation, and
Alaska Pacific Salmon Com-
pany, a corporation.*

1309 Hoge Building,
Seattle, Washington.

FILED
JUN - 7 1943

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

PACIFIC AMERICAN FISHERIES, INC., a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA, *Appellee.*

—and—

ALASKA PACIFIC SALMON COMPANY, a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA, *Appellee.*

UPON APPEALS FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT OF
WASHINGTON. NORTHERN DIVISION
HON. JOHN C. BOWEN, *U. S. District Judge*

OPENING BRIEF OF APPELLANTS

KERR, McCORD & CAREY

STEPHEN V. CAREY

Attorneys for Appellants,

*Pacific American Fisheries,
Inc., a corporation, and
Alaska Pacific Salmon Com-
pany, a corporation.*

1309 Hoge Building,
Seattle, Washington.

INDEX

	<i>Page</i>
Jurisdiction	1
Statement of Issues as Made by Pleadings.....	2
Statement of Evidence.....	6
Alitak	6
Kasaan	8
King Cove and Shumagin	9
Bristol Bay Canneries	10
Petersburg	11
Port Moller	11
Specifications of Error (<i>Pacific American Fisheries, Inc. v. United States</i>)	12
Argument.....	13
PACIFIC ALASKA SALMON COMPANY, a Corporation, v. UNITED STATES	
Drier Bay	22
Sand Point	23
Kake, Port Althorp and Rose Inlet.....	24
Ketchikan	25
Specifications of Error	25
Argument	26

CITATIONS

Statutes:

Internal Revenue Code, 53 Statutes 1, Sections 1400 and 1426	13
Judicial Code, Sections 24 and 128(a).....	2
Revenue Act of 1918, Section 213, 40 Statutes 1057	14
Social Security Act of April 14, 1935,	
49 Statutes 602, Sections 801 and 811.....	13
49 Statutes 603, Section 808.....	13
59 C.J. "Statutes" 1064, Section 626.....	15, 16

Decisions:**Page**

<i>Anderson v. Commissioner</i> , Board of Tax Appeals, Docket No. 108953	20, 21
<i>Bennett v. Commissioner</i> , Board of Tax Appeals, Docket 104524	20
<i>Clifford Jones v. U.S.</i> , 60 Court of Claims 552..	20, 21
<i>Maryland Casualty Co. v. U.S.</i> , 251 U.S. 342....	15, 16
<i>Southern Pacific Co. v. Lowe</i> , 247 U.S. 330.....	15
Decision of Commissioner of Internal Revenue, Mimeograph 5023 Internal Revenue Bulletin No. 16	16
Income Tax Regulations.....	17, 18
Office Decision 814 of Commissioner of Internal Revenue	14

August 9, 1943

Alaska Salmon Industry, Inc.
(Ir:P:T:2, EAC-2)
Victory and Withholding Tax

Commissioner of Internal Revenue
Washington, D.C.

Dear Sir:

Reference is made to the formal ruling signed by Mr. T. Mooney, Deputy Commissioner, dated July 12, 1943, (Ir:P:T:2, EAC-2), addressed to Alaska Salmon Industry, Inc., in which it was generally ruled that the Alaska salmon cannery could make the withholding and Victory tax deductions from the wages of their employees on the basis of a miscellaneous payroll period at the end of the canning season when such wages for the entire season become due and payable.

In connection with this ruling, certain questions have arisen with respect to which we respectfully request a ruling.

1. Are board and room furnished by the Alaska salmon cannery to their employees in Alaska part of the total wages paid to such employees and therefore wages within the meaning of Section 2(a) of the Current Tax Payment Act of 1943 from which deductions are required to be made by the employers?

The Alaska salmon industry, due to its unique seasonal character, determined by the fact that the salmon are caught only when they are returning to fresh water streams to spawn has developed certain practices which are peculiar only to this industry. Since the spawning areas are located in isolated portions of Alaska, and since the spawning seasons occur in different areas in Alaska at different times during the summer months, it is necessary for the employers to

-2-

transport their employees to these isolated points in Alaska where the canning plants are located. The great majority of the canning plants are located in areas which are populated only by native Indians or in very small villages. Therefore, the employers, in order to assure uninterrupted operation of the canning operations during the spawning season, provide board and room for their various employees. Board and room are furnished to the employees by the employer for his convenience in order to recruit employees and to provide living conditions which will satisfy the employees in order to facilitate the canning operations.

2. Are advancements which are made by the employers to employees during the salmon canning season, which have no relation to the hours of work, rates of wages and the wages actually earned, and which are deducted without interest or other charges from the wages due and paid at the end of the canning season, wages from which deductions must be made under the Current Tax Payment Act of 1943?

The wage contracts of the Alaska salmon canners with their various groups of employees, all provide that payment, except where an employee quits or is discharged during the season, is not due until the end of the canning season, although these contracts establish different bases for computation of wages. Some wages are computed on an hourly basis and others on monthly or seasonal bases.

The labor contract with the inside cannery workers requires the employer to make one and only one \$25.00 advancement during the canning season and also requires the employer to pay during the canning season, an allotment for dependents of the employee of \$50.00 per month. The monthly earnings of these workers exceeds \$100.00.

The contract with the fishermen requires the employer to pay advancements up to \$70.00 per month for dependents of the fishermen. The earnings of the fishermen run into thousands of dollars during the season.

All of the other labor contracts with other groups of employees do not have any provisions with respect to advance-

Commissioner of Internal Revenue

August 9, 1943

ments by the employer. It is, however, the general industry practice to make advancements at the request of the employees in irregular amounts but such amounts are always less than the assured earnings of each employee. These advancements are deducted by the employer from the amount of wages earned during the season and payable at the end of the season but no interest or other charges are assessed by the employer with respect to such advancements.

The amount of the advancements have no relation to the actual wages earned during a particular period. For example, the \$45.00 advancement required under the Inside Cannery workers labor contract does not represent any fixed percentage of wages earned during a particular period, such as a week or month or day. This example is true of all other advancements made to other employees. Therefore, it appears that the problem resolves into the question whether these advancements are in effect loans without interest and therefore not wages. In this connection, in view of the irregular amounts advanced, and the lack of relation of the amount of the advancement to the amount of wages earned at the time the advancement is made, a tremendous and complicated task of bookkeeping would be required to compute properly the amount of the deductions to be made from such advancements.

It is believed that the difference between the wages actually earned by the employees and the total amount of the advancements would in all cases be greater than the withholding deductions required to be made from the total amount of such wages.

3. Do your rulings in answer to the above two questions modify in any way the answers given in the above-mentioned ruling dated July 22, 1943?

It seems that the only possibility of a modification of the previous ruling would be a modification to the answer to Question No. 3 in the July 12 ruling resulting from a holding in answer to Question No. 2 above that advancements are wages subject to withholding at the time when the advancements are made, inasmuch as Questions No. 1 and No. 2 answered by the July 12, 1943 ruling refer only to the problem of determining whether the Victory Tax or the current

Commissioner of Internal Revenue

August 9, 1943

Withholding tax deductions are applicable to miscellaneous payroll periods beginning before and after July 1, 1943, and do not refer to the amount or form of wages subject to the respective taxes. However, the Alaska salmon industry appears to consider the July 12 ruling both proper and practical, so that clarification of this point would be desirable.

The salmon packing season is now in progress so that these questions are of immediate concern to the employers. It is therefore respectfully requested that a prompt ruling be issued.

Very truly yours,

John W. MacVey

Attorney for Alaska Salmon Industry, Inc.
Covington, Burling, Hublee, Achenon
and Corb,

701 Union Trust Building
Washington, D.C.

JW:hn

August 10, 1943

IT:P:T-2
EAC-2

Mr. John I. MacVey,
c/o Covington, Burling, Futlee
Acheson and Thorb
701 Union Trust Building
Washington, D. C.

Sir:

Receipt is acknowledged of your letter of August 9, 1943, in which you refer to Bureau ruling of July 12, 1943, holding that the payroll period of Alaska cannery workers employed by the Alaska Salmon Industry, Inc., and paid only at the termination of the season's employment, is a miscellaneous payroll period within the meaning of section 1621 (b) of the Internal Revenue Code, and that the employer is required to deduct and withhold tax only at the end of the season when he makes payment of the wages to employees for such season's employment.

You now request a ruling with respect to three questions which have arisen in connection with the aforementioned ruling. These questions will be answered in the order presented.

Question 1. "Are board and room furnished by the Alaska salmon canners to their employees in Alaska part of the total wages paid to such employees and therefore wages within the meaning of Section 2(a) of the Current Tax Payment Act of 1943 from which deductions are required to be made by the employers?"

The information contained in your letter shows that because the canning plants are located in isolated points in Alaska, the employer is required, in order to recruit employees, to provide them with satisfactory living quarters and meals.

Section 404.15 of the regulations promulgated under the Current Tax Payment Act of 1943, contained in Treasury Decision 5277, approved June 28, 1943, provides among other things, that if a person receives as remuneration for services a salary and in addition thereto living quarters or meal, the value to such person of the quarters and meals so furnished shall be added to the remuneration otherwise paid for the purpose of determining the amount of wages subject to withholding, but if living quarters or meals are furnished to employees for the convenience of the employer, the value thereof need not

be included as wages subject to withholding. The Bureau holds that the test of "convenience of the employer" is satisfied if living quarters and meals are furnished to an employee, who because of the nature of his work, is required to reside on the premises in order properly to perform his duties.

Based upon the information submitted by you, it is the opinion of this office that the living quarters and meals furnished the employees referred to are "for the convenience of the employer", and it is held that the value thereof is not includible in wages for the purpose of withholding, and, therefore need not be considered in determining the amount of tax to be withheld from their wages.

Question 2. "Are advancements which are made by the employers to employees during the salmon canning season, which have no relation to the hours of work, rates of wages and the wages actually earned, and which are deducted without interest or other charges from the wages due and paid at the end of the canning season, wages from which deductions must be made under the Current Tax Payment Act of 1943?"

Inasmuch as the wage contracts of the Alaska salmon canners with their various groups of employees, all provide that payment, except where the employee quits or is discharged during the season, is not due until the end of the canning season, the season is considered to be the payroll period. Advances made to such employees during the season are considered to be in the nature of loans, and withholding of the tax is not required at the time the advances are made. The wages subject to withholding of the tax at the end of the season should include the advances made employees during the season.

Question 3. "Do your rulings in answer to the above two questions modify in any way the answers given in the above-mentioned ruling dated July 12, 1943?"

This ruling does not modify the prior ruling of July 12, 1943, referred to above.

Respectfully,

T. Mooney

Deputy Commissioner.

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

PACIFIC AMERICAN FISHERIES, INC., a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA, *Appellee.*

—and—

ALASKA PACIFIC SALMON COMPANY, a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA, *Appellee.*

No. 10395

UPON APPEALS FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT OF
WASHINGTON. NORTHERN DIVISION

HON. JOHN C. BOWEN, *U. S. District Judge*

OPENING BRIEF OF APPELLANTS

JURISDICTION

Pacific American Fisheries, Inc., and Alaska Pacific Salmon Company, Appellants, operate salmon packing plants in remote locations in Alaska. They each paid social security taxes (old age benefits and unemployment insurance) on account of their 1937, 1938 and 1939 operations. These payments included

certain amounts computed upon the value of board and lodging furnished employees at the canneries in Alaska during the brief operation seasons. Claims were made for the refund of the taxes paid to the extent that they were computed and exacted upon the assumed value of the board and lodging so furnished. The claims having been rejected, actions to recover the several amounts were prosecuted in the District Court which denied recovery. From the judgments dismissing the actions, these appeals are prosecuted. The cases present a single question of law arising out of similar facts. As a matter of convenience, the two cases were tried together in the District Court and for the same reason are presented together in this Court.

Jurisdiction in the District Court is founded on Judicial Code, Section 24, amended-fifth.

Jurisdiction of this Court is invoked by virtue of the provisions of Section 128(a) of the Judicial Code amended.

STATEMENT OF ISSUES AS MADE BY PLEADINGS

The complaint of Pacific American Fisheries, Inc., No. 396 in the District Court (transcript 2-9) sets out five separate causes of action. The formal allegations of the first cause of action are by reference incorporated into the second, third, fourth and fifth causes of action.

Paragraph I, first cause of action (transcript 2) alleges that the plaintiff, Pacific American Fisheries, Inc., is a Delaware corporation authorized to do business in the State of Washington and the Territory of

Alaska and contains formal allegations necessary to disclose its right to maintain an action against the United States on the claims asserted. The allegations of this paragraph are admitted by the defendant except the formal allegation in the nature of a conclusion that the "plaintiff is justly entitled to the amount herein claimed from the United States" (Transcript 10).

Paragraph II of the first cause of action alleges:

"In the years 1937, 1938, and 1939 plaintiff was engaged in the business of catching and packing salmon. In conducting such business during the operating seasons of said year, it (1*) operated a number of canneries with necessary traps and floating equipment situated in remote or isolated locations in Southeastern Alaska, on Kodiak Island, along the Alaska Peninsula, and on Bristol Bay. Said canneries were operated only during the fishing season, covering a period of only a few weeks in the Bristol Bay area and not exceeding several months in the other districts depending upon the run of fish in the several districts in which said canneries were located. During the remainder of said years said canneries were closed down and for all practical purposes deserted except for a watchman left in charge of each.

"To operate said canneries efficiently or at all, it was necessary that the plaintiff in advance of the fishing and operating season transport practically all its help from Bellingham and Seattle, Washington, and from Portland, Oregon, to its several Alaska canneries and return them to the several ports of embarkation at the end of the fishing and operating season. During the

fishing and operating season, it was necessary that the plaintiff as a part of its operations furnish such employees with lodging and sustenance at the canneries at which they were employed, for otherwise no facilities for lodging and sustenance would have been available to them and it would have been impossible for plaintiff to have operated such canneries at all." (Transcript 3-4)

By its answer (transcript 10) the defendant denies this paragraph of the complaint for want of information.

Paragraph III of the first cause of action (transcript 4) alleges:

"During the fishing and operating season of 1937 the plaintiff so transported to and employed in its said Alaska canneries numerous workmen on account of which employment it became obligated to pay taxes under Title VIII of the Social Security Act. On October 30, 1937, the plaintiff filed with the Collector of Internal Revenue at Tacoma, Washington, its return (2) covering its 1937 operations, which return showed \$748,725.11 paid in cash for wages and \$140,954.50 as the estimated value of lodging and sustenance furnished to its Alaska employees during that season. A tax computed upon the aggregate of said two amounts (\$889,679.61) was paid to the Collector of Internal Revenue at Tacoma, Washington, by the plaintiff on October 30, 1937, in the sum of \$8,986.80, which payment included \$1,409.54, being 1% of said sum of \$140,954.50, the estimated value of such lodging and sustenance. Said sum of \$1,409.54 was paid in error in that the said estimated value of lodging and sustenance upon which that sum was

computed and paid as a tax was not wages nor taxable as wages; that on April 2, 1938, the plaintiff duly filed its claim with said Collector of Internal Revenue to whom said excess taxes were paid for the refund of the same and said claim was rejected in its entirety by the Commissioner of Internal Revenue on July 11, 1939; that said sum of \$1,409.54 with 6% interest thereon from said date of payment is justly owing to the plaintiff." (Transcript 4-5)

By its answer the defendant admits the allegations of this paragraph except that it denies that the sum of \$1,409.54 was paid in error by reason of the facts alleged and admitted (Transcript 10).

The second cause of action (Transcript 5-6) involves a claim for \$269.05 based upon a supplemental return covering certain additional 1937 employees not included in the return described in the first cause of action.

The third cause of action is identical except that it is a claim for \$1,417.57 covering 1938 operations (Transcript 6-7).

The fourth cause of action is a claim for \$57.26 arising out of a later return covering operations during the last quarter of 1938 (Transcript 7-8).

The fifth cause of action involves the claim of \$1,-290.86 arising out of the return covering the 1939 operations. The answers made to the second, third, fourth and fifth causes of action are identical with that made to the first cause of action (Transcript 11).

STATEMENT OF EVIDENCE

Because the defendant formally denied paragraph II of the first cause of action, descriptive of the company's Alaska operations in 1937, 1938 and 1939, it became necessary to introduce evidence to establish the facts so alleged.

Russell Mowry was comptroller of Pacific American Fisheries, Inc., during the years 1937, 1938 and 1939, and as such official, was familiar with its operations during those years. He testified in detail relative to this company's several operations.

ALITAK

Alitak is located on the southwestern tip of Kodiak Island and operated there during the years 1937, 1938 and 1939 (Transcript 5-8). There is nothing at Alitak but the cannery. It is a three-line cannery having a capacity of 100,000 or 125,000 cases. The operations in one year would be typical of the other two years. Alitak is about 60 miles west of Kodiak and probably 150 miles west of Seward. The Town of Kodiak is located on the other or northeastern end of Kodiak Island, but there are no means of communication between the two ends of the island. Alitak is about 150 miles from Cordova. During a representative year there are about 180 or 190 men employed at the Alitak cannery, 90% of whom come from Seattle. These men leave Seattle about the middle of April and come back about the middle or the end of September.

In 1937 Pacific American Fisheries, Inc., operated their own ocean-going vessels. Transportation was

furnished to the men as part of the operation. The men embarked at either Seattle or Bellingham and at the end of the season were discharged at Seattle or Bellingham. They were furnished board and lodging aboard ship (Transcript 61-63).

The fish packed at the Alitak cannery are obtained from traps, gill nets and seines. The daily operations are carried on at irregular hours during the height of the season. You never know when the seine boats are coming in, and you have to have the crews ready during practically the whole twenty-four hours to can fish. Bunk houses are provided and the men eat at mess houses. The bunk houses and mess houses are operated by the company and are located right at the cannery. The company operates its own mess houses and bunk houses at the cannery during the season as an operating necessity so that the meals and the men can dovetail with the operation. It would not be possible to efficiently operate the cannery at that remote place under any different arrangement. It would not be possible to operate the cannery leaving the men to provide for their own board and lodging. At Alitak the company has maintained a doctor due to the remoteness of the location. He is a strictly medical man and first-aid man to take care of injured and sick people. The reason for maintaining a licensed physician at Alitak is that the place is so isolated that there is no other doctor around there. It is the human thing to do and it is also necessary in relation to the efficiency of the operation. The operation as described in 1937 applies equally for the other two years (Transcript 64-66).

KASAAN

In 1937 the company operated at Kasaan which is about 30 miles west of Ketchikan. It operated at the same location in 1938, but did not operate at Kasaan in 1939 (Transcript 58).

It would not be possible for the employees employed at Kasaan during the fishing season to live at Ketchikan. The average number of men employed is about 200. It is a relatively large operation. The length of the season at Kasaan and at other southeastern Alaska points differs somewhat from the length of the season at Bristol Bay or to the westward or on the Peninsula. The season at Kasaan starts a little later than it does to the westward and closes a few days later. The majority of men employed during the season at Kasaan come from Seattle. Extreme limits of the operating season is from about the 1st of April to the end of September. Board and lodging are furnished at Kasaan during the operating season substantially in the same manner and for the same reasons already described with reference to Alitak. What has been said about 1937 would apply equally in 1938 at Kasaan. The hours of operation at Kasaan are irregular for the same reasons. The source of supply at Kasaan is principally traps. The fish caught in the traps are brought from a distance of from 60 to 70 miles, and are brought in at irregular hours depending on tides, winds and storms. It is necessary to keep the crew constantly present at the cannery to meet conditions as they may exist from day to day. A first-aid man is maintained at Kasaan. The first-aid man is generally a medical student or an intern.

The close proximity of Ketchikan makes it unnecessary to maintain a doctor there (Transcript 66-69).

KING COVE AND SHUMAGIN OR SQUAW HARBOR

The company operated at King Cove in 1937, 1938 and 1939. This cannery is located on the south side of the Alaska Peninsula about 100 miles east of Dutch Harbor and 250 miles west of Seward (Transcript 58).

The Shumagin cannery, also known as Squaw Harbor, was operated in 1937, 1938 and 1939. It is located in the Shumagin Islands about 50 miles east of the King Cove cannery. These two canneries, King Cove and Shumagin, are relatively close together out to the westward along the Alaska Peninsula. The King Cove cannery is on the mainland and the Shumagin cannery is in the Shumagin Islands. The nearest point of any consequence is Seward which is about 250 miles distant. There are no facilities available at King Cove or Shumagin for the housing and feeding of the employees during the season other than such mess houses and bunk houses as the company itself furnishes. Lodging and meals are furnished at these canneries during the season in substantially the same manner and for the same reasons as has already been described with reference to Alitak. A licensed physician is employed at Shumagin to take care of both canneries. The operating season is from the 1st of April to the middle of September. The fish are obtained from traps, gill nets and seines. The daily operation is irregular for the reasons already stated. The King Cove cannery has a larger capacity

than the Shumagin cannery. In a good year King Cove will pack an average of 175,000 cases and Shumagin probably 150,000. King Cove is probably the largest cannery in Alaska and Shumagin is larger than the average (Transcript 69-72).

BRISTOL BAY CANNERIES

The company operated at Naknek on Bristol Bay in 1937, 1938 and 1939. It operated at Nornek on Bristol Bay in 1937 and in 1938, but not in 1939. The company operated at Nushagek on Bristol Bay in 1937 and in 1939, but not in 1938 (Transcript 59).

The three canneries on Bristol Bay are located relatively close to each other so that the operations at the three places are practically identical. Each cannery has a capacity around 125,000 cases a year. About 600 or 700 men are employed during the season at the three places, equally divided between the three canneries. The operating season on Bristol Bay differs from the operating season at the other locations already mentioned in that the fishing is done entirely by seine boats during a very short and intensive season. The pack is almost exclusively red salmon and the run of red salmon available for packing is ordinarily during the month of July only. There are no accommodations for lodging or sustenance other than the accommodations furnished by the company. Lodging and sustenance are furnished by the company for the same reasons already stated with reference to Alitak. The means of getting the men from and to the canneries are the same as already have been described. A licensed doctor at Nak-

nek also takes care of Nornek which is across the river. At Nushagek there is a first-aid man as the government has a hospital nearby (Transcript 72-73).

PETERSBURG

The company operated at Petersburg in 1937 and in 1938, but did not operate there in 1939. Petersburg is about 60 miles north of Ketchikan in southeastern Alaska (Transcript 59-60).

The cannery is located in the Town of Petersburg which has about 1500 or 2000 people during the summer. The company maintains accommodations for lodging and feeding its employees at Petersburg as at the other canneries described and for the same reasons. The fish packed at Petersburg are obtained from traps and seines. Although Petersburg is an established community, the town is not big enough to accommodate the influx of cannery help during the cannery season. It is impossible for the local people to furnish food and lodgings, so as a practical matter, the company is confronted with the same situation as at a cannery further removed from an established settlement. You never know when the fish are coming in and you have to have the crew standing by (Transcript 75-77).

PORT MOLLER

Port Moller is on the northwest side of the Alaska Peninsula about 200 miles east of Dutch Harbor. The company operated there in 1937, and 1939, but not in 1938 (Transcript 60).

Port Moller is about 400 miles from the Bristol Bay canneries described. This cannery produces about

25,000 cases per year and is a relatively small operation employing about 100 men. The season is a little bit longer than at Bristol Bay. The men get there about the 1st of June and leave around the end of August. The nearest permanent settlement is Dutch Harbor, 200 miles distant. There are no accommodations at Port Moller for the housing and feeding of men other than those furnished by the company itself, and the housing and sustenance are furnished the same as at Alitak and for the same reasons (Transcript 74-75).

SPECIFICATIONS OF ERROR

In the case of *Pacific American Fisheries, Inc., a corporation, Plaintiff, v. United States of America, Defendant*, No. 396, in the District Court, the District Court erred:

I.

In entering Findings of Fact (Transcript 12-18), Conclusions of Law (Transcript 18), and Judgment (Transcript 19), in favor of the defendant, and dismissing the complaint.

II.

The Trial Court erred in failing to find that board and lodging furnished by Pacific American Fisheries, Inc., to its employees in Alaska during the operating seasons were furnished for the convenience of the employer and the value thereof, therefore, was not taxable as wages to its employees.

ARGUMENT

The case presents for decision the single question whether the value of the board and lodging, furnished under the circumstances shown, to appellant's employees while in Alaska during the short annual operating season constitutes wages taxable for social security purposes. There is no controversy concerning the amount of the taxes so exacted and paid.

The Social Security Act of April 14, 1935, 49 Statutes, 602, provides for a system of old age benefits, unemployment compensation, etc.

Section 801 of that Act provides:

“* * * There shall be levied, collected and paid upon the income of every individual a tax equal to the following percentage of the wages as defined in Section 811. * * *”

Section 811 of the Act defines wages as follows:

“The term ‘wages’ means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash.
* * *”

The quoted sections of the original Social Security Act became respectively Sections 1400 and 1426 of the Internal Revenue Code (Act of February 10, 1939, 53 Statutes, 1).

Section 808 of the original Act of April 14, 1935, makes the Commissioner of Internal Revenue its administrator with power to make and publish rules and regulations for the enforcement of the Act, and Section 3901 of the Internal Revenue Code provides that the Commissioner of Internal Revenue, “shall have general superintendence of the assessment and col-

lection of all taxes imposed by any law providing for internal revenue."

Section 1400 of the Internal Revenue Code provides that the taxes to be collected to provide the funds to make social security benefits available, shall be levied *upon the income* of every individual, etc. This phraseology had been carried forward into the Internal Revenue Code from prior revenue acts reaching back at least as early as income tax of 1918 which defined gross income as:

"* * * income derived from salaries, wages or compensation for personal service * * * of whatever kind and in whatever form paid." 40 Statute 1057, Section 213, p. 1065

In the meantime and prior to the passage of the Social Security Act in 1935, this definition of wages as income had been given meaning by the Internal Revenue Department.

The Commissioner of Internal Revenue is the executive officer charged with the administration of these Federal tax laws, and hence his decisions are binding on the Federal courts unless clearly erroneous.

As early as 1921, fourteen years prior to the passage of the Social Security Act in 1935, the Commissioner, by Office Decision 814, determined that:

"Where, from the location and nature of work, it is necessary that employees engaged in fishing and canning be furnished with lodging and sustenance by the employer, the value of such lodging and sustenance may be considered as being furnished for the convenience of the employer and need not, therefore, be included in computing net income of the employees."

This was the settled meaning of the word "wages" in the fishing industry when Congress, in passing the Social Security Act in 1935, defined "wages" as follows:

"The term 'wages' means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash
* * *."

This situation makes applicable two elementary rules of statutory construction:

1. When a definition or provision having a well settled meaning under an earlier statute is carried forward into a later statute, it is given the same construction in the later statute that it had in the earlier statute from which it was taken.

2. The interpretation placed on a statute by the chief executive officer charged with its administration is binding on the courts unless clearly erroneous.

While these rules are so elementary that it seems hardly necessary to cite authorities, a reference to the following may not be out of place:

Southern Pacific Company v. Lowe, 247 U.S. 330;

Maryland Casualty Company v. United States, 251 U.S. 342;

59 C.J., "Statutes," 1064, §626.

In the *Southern Pacific Company* case, involving an income tax question, the court said (page 335):

"Certainly the term 'income' has no broader meaning in the 1913 act than in that of 1909
* * * and for the present purpose we assume that there is no difference in its meaning as used in the two acts."

In the *Maryland Casualty Company* case the court held that the term income "received" had the same meaning in an act of 1913 as it had in an earlier act of 1909.

"The reenactment of a statute, or the passage of a similar one, in the same or substantially the same terms, after it has received a practical construction by the executive or administrative departments of the government, or by the legislature itself, is an adoption of such construction, or is, at least, highly persuasive, especially where the original statute has been repeatedly reenacted since its executive construction; *and a subsequent executive construction, contrary to the original one, is not entitled to weight.*" 59 C.J. 1064, §626 (Italics supplied)

Congress is presumed to have known how the term "wages" had been construed and interpreted by the Commissioner for the purpose of administering the income tax laws over a long period of years, and if Congress in passing the Social Security Act in 1935 had intended to give that term a different meaning or application, presumably it would have used language to express that different intent. When Congress carried forward into the later statute substantially the same definition that appeared in the earlier statute, it must be assumed that for administrative purposes it intended the term should have the same meaning in both statutes.

On March 22, 1940, the present Commissioner of Internal Revenue restated the ruling of his predecessor in Mimeograph 5023, Internal Revenue Bulletin No. 16, 1940, page 2, as follows:

“* * * For further examples of circumstances under which it has been held that quarters were furnished for the convenience of the employer and the value thereof need not be included in the gross income of the employees, see O. D. 814 (C.B. 4, 84 (1921)), relating to fishermen and cannery * * *.”

and further stated that:

“* * * it is necessary that employees engaged in fishing and canning be furnished with lodging and sustenance by the employer * * * for the convenience of the employer * * *.”

In 1935 the Congress passed the Social Security Act and, in determining the yardstick by which the amount of tax should be computed with respect to wages, it used almost the identical words appearing in the Income Tax Acts effective continuously for some 17 years prior thereto. The Commissioner in 1921 determined the meaning of the word *wages*; and the present Commissioner adopted that interpretation in 1940.

The Social Security Act follows the Income Tax Regulations in providing that traveling expenses do not constitute taxable income (SS.T. 28 (C.B. XV-2, 397 (1936)). The following is quoted from Income Tax Regulations 103 (Sec. 19.23 (a)-2):

“Traveling expenses, as ordinarily understood, include railroad fares and meals and lodging. If the trip is undertaken for other than business purposes, the railroad fares are personal expenses and the meals and lodging are living expenses. If the trip is solely on business, *the reasonable and necessary* traveling expenses, *meals,*

and lodging are business expenses." (Italics supplied)

"(a) If, then, an individual, whose business requires him to travel, receives a salary as full compensation for his services, without reimbursement for traveling expenses, or is employed on a commission basis with no expense allowance, his traveling expenses, including the entire amount expended for meals and lodging, are deductible from gross income.

"(b) If an individual receives a salary and is also repaid his actual traveling expenses, he shall include in gross income the amount so repaid and may deduct such expenses."

Among the exclusions from wages appears the following, S.S.T. 383 (C.B. 1940-1, page 210):

"Amounts paid by the M Baseball Club to cover transportation, room, and board of its players while in training and while away from its home grounds do not constitute 'wages' within the meaning of the Federal Insurance Contributions Act.

"The question is presented whether certain amounts paid by the M Baseball Club to cover expenses of its players constitute 'wages' within the meaning of the Federal Insurance Contributions Act.

"During the period of approximately four weeks when the players of the M Baseball Club are at the training camp preparing for the regular baseball season, they receive no remuneration since their salaries are payable only for services performed during the actual playing season. The Club furnishes the players railroad transportation from their homes to the training camp. While in training the players stay at a designated hotel and their meals are furnished by the hotel or by

some restaurant where an account has been established by the club, which pays the expenses in question and carried them on its books as 'training and travel expense.' The club also pays such expenses of the players under the contract during the season, when the team is playing away from its home grounds, but otherwise the players pay their own living expenses.

"It is held that the amounts paid by the M Baseball Club to cover transportation, room, and board of its players under the circumstances stated do not constitute 'wages' within the meaning of the Federal Insurance Contributions Act. (See Article 16(c), Regulations 91.)

"THE CONCLUSION REACHED HEREIN IS APPLICABLE ALSO UNDER THE FEDERAL UNEMPLOYMENT TAX ACT AND UNDER TITLES VIII AND IX OF THE SOCIAL SECURITY ACT."

The fishing season covers a period of only a very few months during the year. The balance of the year is spent by these employees elsewhere. Lodging and sustenance in Alaska are furnished to cannery workers for the same reason that any employee required to travel in the performance of his duties, such as baseball players, traveling salesmen, buyers for department stores, professional men, etc., are furnished transportation, lodging and sustenance while traveling.

The evidence discloses that at these remote and isolated locations in Alaska it is the common practice for the employer to furnish not only lodging and sustenance but medical aid as well. If the operation is not large enough to justify a regularly licensed

physician, then a pharmacist or other person capable of furnishing first aid is made available. This medical service is furnished by the employer in part for humanitarian reasons, but more particularly for the convenience of the employer in order to promote efficiency of the operation. There is no more reason for regarding lodging and sustenance furnished for that same reason as wages than there is for regarding first aid medical services as wages.

If, as the Commissioner has authoritatively ruled, the value of lodging and meals furnished to professional ball players in training in Florida or elsewhere is not taxable wages for either income tax purposes or social security purposes, it is difficult to understand how meals and a bed furnished in mess house and bunk house to an Alaska fisherman can be something essentially different.

The following decisions although arising under income tax laws, are nevertheless directly in point:

Bennett v. Commissioner, Board of Tax Appeals Docket No. 104524 entered October 28, 1942;

Anderson v. Commissioner, Board of Tax Appeals Docket No. 108953 entered December 18, 1942;

Clifford Jones v. The United States, 60 Court of Claims 552.

In the *Bennett* case Mrs. Bennett was employed as a matron and housekeeper at a sanatorium operated for the treatment of mental patients. Her duties required that she and her husband continuously reside at the institution. The taxing authorities determined that the quarters and meals so furnished had a value

of \$2,400.00 a year and that value was taxable as income. In holding to the contrary, the Board in its opinion said,

“Where an employee, for the convenience of his employer and as a necessary and essential incident to the proper performance of his duties, receives living quarters and meals from the employer, the value thereof does not constitute taxable income to the employee.”

The *Anderson* case was one involving a hotel manager whose duties required that he live at the hotel. In the findings of fact of the Board, it was said,

“Petitioner’s residence at the hotel was not for his personal convenience, comfort or pleasure, but for the purpose of enabling him to perform his work efficiently * * *.”

On the authority of prior cases quoted in the opinion, the value of the board and lodging was held not to be additional wages or salary.

In *Clifford Jones v. The United States* the Court of Claims held that (quoting syllabus) :

“Quarters furnished to officers of the Army in kind and commutation of quarters paid to them where quarters can not be furnished in kind, are allowances and not compensation within the meaning of the laws of Congress imposing the income tax.”

The decision is too long to be quoted in full and excerpts from it would not fairly represent the views of the Court. It is sufficient to say, however, that the question is examined at great length both on principle and authority, and it is shown conclusively that in no proper sense can such allowances be regarded as income, wages or salary.

**PACIFIC ALASKA SALMON COMPANY, a corporation,
v. UNITED STATES, No. 397, in District Court**

In this case the District Court had jurisdiction and this Court has jurisdiction on appeal by virtue of the same sections of the Judicial Code referred to in the preceeding brief filed in the companion case of Pacific American Fisheries, Inc., Appellant. The case involves the same questions of law arising out of entirely similar facts submitted to the Trial Court on similar pleadings.

Complaint (Transcript 24), Answer (Transcript 31), Findings of Fact and Conclusions of Law (Transcript 34-42), Judgment (Transcript 42-43). The Complaint states three causes of action. The first cause of action covers the operations of this appellant during the season of 1937, the amount claimed being \$621.67 with interest. The second cause of action involves the operations of this appellant during the 1938 season, the amount claimed being \$595.45 with interest. The third cause of action covers the operations of this appellant during the 1939 season, the amount claimed being \$573.58 with interest.

Fred W. Tegtmeyer, an official of Alaska Pacific Salmon Company familiar with its operations in 1937, 1938 and 1939, testified in substance as follows:

Drier Bay

Drier Bay is located on Knight Island in Prince William Sound approximately 75 miles west of Cordova. A fishing operation only was carried on in 1937. We did not operate the cannery or pack fish there. Five floating traps were operated and the fish

hauled to another cannery for packing. The company owned a cannery at Drier Bay, but did not operate it in the year 1937. The men employed at Drier Bay in 1937 were all employed in connection with the operation of the traps with the exception of a watchman at the cannery. The number of men employed was approximately 30. While on shore they were housed and fed by the company at the bunk house and mess house. While not on shore, they were housed and fed on the boats or gear scow by the company. There were no means of housing or feeding the men otherwise than was done. The season at Drier Bay extended from April 1 to September 1. There were no other accommodations nearer than Cordova 70 miles distant and it was not practical to have the men live at Cordova and work on these traps. The operations on the traps from day to day were irregular and that factor had relation to the necessity of having the men on the job available at all times. The company did not operate at Drier Bay in 1938 or 1939 (Transcript 81-83).

Sand Point

The company had an operation at Sand Point in all three years. The operation carried on in 1937 was substantially identical with that carried on in the two succeeding years. Sand Point is about 300 miles east of Dutch Harbor in the Shumagin Islands and about 10 miles distant from the Shumagin or Squaw Harbor plant of Pacific American Fisheries, Inc. The operation carried on by Alaska Pacific Salmon Company at Sand Point was substantially identical with the operations at King Cove and Shu-

magin as described by Mr. Mowry. That was true as to the housing and feeding of the men. The daily operation was irregular. The season at Sand Point is from the 1st of April to the 1st of September. About 180 men are normally employed. The normal pack at Sand Point is about 125,000 cases. The company supplies board and lodging at Sand Point because there are no other accommodations available for employees, and it would not be practical for the operation to be carried on at all if the board and lodging were not supplied by the company itself. At Sand Point no medical aid is furnished but we have a joint agreement with the Pacific American Fisheries to call on their doctor at Squaw Harbor. It would not be possible for the men to furnish their own food and lodgings (Transcript 83-85).

Kake, Port Althorp and Rose Inlet

The remaining canneries operated by the Alaska Pacific Salmon Company, Inc., were located at Kake, Ketchikan, Port Althorp and Rose Inlet in southeastern Alaska and all were operated in 1937, 1938 and 1939. Kake is located about 60 miles west of Petersburg the nearest established settlement. That operation is carried on in all essential particulars as the Pacific American Fisheries, Inc., operations at Kasaan and Petersburg described by Mr. Mowry. The fish are caught in the same way, the cannery operated in the same way, and the sustenance and lodging furnished in the same way and for the same reasons.

What I have said about Kake would apply equally to Port Althorp and Rose Inlet. Port Althorp is lo-

cated about 120 miles west of Juneau and about 70 miles north of Sitka. Rose Inlet is located about 60 miles west of Ketchikan (Transcript 88-89).

Ketchikan

The operation of Alaska Pacific Salmon Company at Ketchikan is substantially identical with the Pacific American Fisheries, Inc., operation at Petersburg as described by Mr. Mowry. The men are fed and housed in substantially the same way and for the same reason. The canneries of Alaska Pacific Salmon Company are all located on land. There are no floating canneries (Transcript 90-91).

SPECIFICATIONS OF ERROR

In the case of *Alaska Pacific Salmon Company, a corporation, plaintiff, v. United States of America, defendant*, No. 397 in the District Court, the District Court erred:

I.

In entering Findings of Fact (Transcript 34-41), Conclusions of Law (Transcript 41) and Judgment (Transcript 41-43) in favor of the defendant and dismissing the complaint.

II.

The Trial Court erred in failing to find that board and lodging furnished by Alaska Pacific Salmon Company, a corporation, to its employees in Alaska during the operating seasons were furnished for the convenience of the employer and the value thereof, therefore, was not taxable as wages paid to its employees.

ARGUMENT

The appeal of Alaska Pacific Salmon Company is submitted on the argument already made in the companion case entitled *Pacific American Fisheries, Inc., a corporation, Appellant, v. United States of America, Appellee*. Both judgments should be reversed with directions to award appellants' recoveries as prayed for in their respective complaints.

Respectfully submitted,

KERR, McCORD & CAREY

STEPHEN V. CAREY

*Attorneys for Appellants,
Pacific American Fisheries,
Inc., a corporation, and
Alaska Pacific Salmon Com-
pany, a corporation.*

Seattle, Washington.
1309 Hoge Building,

No. 10395

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

PACIFIC AMERICAN FISHERIES, INC., a
corporation,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

ALASKA PACIFIC SALMON COMPANY, a
corporation,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

UPON APPEALS FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF FOR THE UNITED STATES

SAMUEL O. CLARK, JR.,
Assistant Attorney General.

SEWALL KEY,
J. LOUIS MONARCH,
MILLS KITCHIN,

*Special Assistants to the
Attorney General.*

J. CHARLES DENNIS,
United States Attorney.

HARRY SAGER,
Assistant United States Attorney.

THOMAS R. WINTER,
*Special Assistant to
the Chief Counsel.*

1017 UNITED STATES COURTHOUSE
SEATTLE, WASHINGTON

CLERK

FILED
JUL 16 1943

No. 10395

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

PACIFIC AMERICAN FISHERIES, INC., a
corporation,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

ALASKA PACIFIC SALMON COMPANY, a
corporation,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

UPON APPEALS FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF FOR THE UNITED STATES

SAMUEL O. CLARK, JR.,
Assistant Attorney General.

SEWALL KEY,
J. LOUIS MONARCH,
MILLS KITCHIN,
*Special Assistants to the
Attorney General.*

J. CHARLES DENNIS,
United States Attorney.

HARRY SAGER,
Assistant United States Attorney.

THOMAS R. WINTER,
*Special Assistant to
the Chief Counsel.*

1017 UNITED STATES COURT HOUSE
SEATTLE, WASHINGTON

INDEX

OPINION BELOW	1
JURISDICTION	1
QUESTION PRESENTED	3
STATUTES AND REGULATIONS INVOLVED	3
STATEMENT	5
SUMMARY OF ARGUMENT	7
ARGUMENT:	

Lodgings and sustenance are part of the remuneration for services performed and therefore constitute wages.....	7
---	---

CONCLUSION	14
------------------	----

CITATIONS

CASES:

<i>Helvering v. N. Y. Trust Co.</i> , 292 U. S. 455....	10
<i>Towne v. Eisner</i> , 245 U. S. 418.....	11

STATUTES:

Social Security Act, c. 531, 49 Stat. 620:	
Sec. 804 (U.S.C. 1940 ed., Title 42, Sec. 1001)	3
Sec. 808 (U.S.C. 1940 ed., Title 42, Sec. 1008)	4
Sec. 811 (U.S.C. 1940 ed., Title 42, Sec. 1011)	4

MISCELLANEOUS:

H. Rep. No. 615, 74th Cong., 1st Sess., pp. 3-5, 32	8, 10
O. D. 814, 4, Cum. Bull. 84 (1921).....	9
S. Rep. No. 628, 74th Cong., 1st Sess., pp. 4-22.	10
S. S. T. 321, 1938-2 Cum. Bull. 323	11
S. S. T. 383, 1940-1 Cum. Bull. 201.....	11
S. S. T. 386, 1940-1 Cum. Bull. 211.....	11
Treasury Regulations 91, Art. 14.....	4, 12

No. 10395

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

PACIFIC AMERICAN FISHERIES, INC., a
corporation,

Appellant

v.
UNITED STATES OF AMERICA,

Appellee

ALASKA PACIFIC SALMON COMPANY, a
corporation,

Appellant

v.
UNITED STATES OF AMERICA,

Appellee

UPON APPEALS FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

OPINION BELOW

The court below did not write an opinion, but
filed its Findings of Fact and Conclusions of Law,
which are not reported. (R. 12, 34.)

JURISDICTION

Pacific American Fisheries instituted its suit on
July 7, 1941, for the recovery of social security taxes

paid for the years 1937, 1938, and 1939 (R. 2-9), pursuant to Section 24 of the Judicial Code, as amended. The court below on October 5, 1942, entered its Findings of Fact and Conclusions of Law in accordance with the provisions of Rule 52(a) of the Federal Rules of Civil Procedure, and entered judgment on October 31, 1942, dismissing plaintiff's complaint and taxing it with costs. (R. 12-20.) On January 9, 1943, plaintiff below filed its notice of appeal in accordance with the provisions of Rule 73 of the Federal Rules of Civil Procedure. (R. 21.) The appeal was thereupon effectuated pursuant to the provisions of Section 128(a) of the Judicial Code, as amended.

Alaska Pacific Salmon Company instituted its suit on July 8, 1941, for the recovery of social security taxes paid for the years 1937, 1938, and 1939 (R. 24-31), pursuant to Section 24 of the Judicial Code, as amended. The court below on October 13, 1942, entered its Findings of Fact and Conclusions of Law in accordance with the provisions of Rule 52(a) of the Federal Rules of Civil Procedure, and entered judgment on October 13, 1942, dismissing plaintiff's complaint and taxing it with costs. (R. 34-43.) On January 11, 1943, plaintiff below filed its notice of appeal in accordance with the provisions of Rule 73 of the Federal Rules of Civil Pro-

cedure. (R. 44.) The appeal was thereupon effectuated pursuant to the provisions of Section 128(a) of the Judicial Code, as amended.

QUESTION PRESENTED

Did the estimated value of lodging and sustenance, which taxpayer furnished its employees in connection with its fishing and canning operations in Alaska, constitute wages within the meaning of Section 804 of the Social Security Act?

STATUTES AND REGULATIONS INVOLVED

Social Security Act, c. 531, 49 Stat. 620:

TITLE VIII—TAXES WITH RESPECT TO EMPLOYMENT

* * *

Excise Tax on Employers

SEC. 804. In addition to other taxes, every employer shall pay an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in Section 811) paid by him after December 31, 1936, with respect to employment (as defined in Section 811) after such date:

(1) With respect to employment during the calendar years 1937, 1938, and 1939, the rate shall be 1 per centum. * * * (U.S.C. 1940 ed., Title 42, Sec. 1001).

* * *

Rules and Regulations

SEC. 808. The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall make and publish rules and regulations for the enforcement of this title. (U.S.C. 1940 ed., Title 42, Sec. 1008)

* * *

Definitions

SEC. 811. When used in this title—

(a) The term “wages” means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; * * * (U.S.C. 1940 ed., Title 42, Sec. 1011)

Treasury Regulations 91, under Title VIII of the Social Security Act:

ART. 14. Wages.—The term “wages” means all remuneration for employment (see article 2).

* * *

* * *

The name by which the remuneration for services is designated is immaterial. Thus, salaries, fees, bonuses, and commissions on sales or on insurance premiums, are wages within the meaning of the Act if paid by an employer to his employee as compensation for employment.

* * *

The medium in which the remuneration is paid is also immaterial. It may be paid in cash or in something other than cash, such as goods, lodging, food and clothing.

* * *

Ordinarily, facilities or privileges (such as entertainment, cafeterias, restaurants, medical services, or so-called "courtesy" discounts on purchases), furnished or offered by an employer to his employees generally, are not considered as remuneration for services if such facilities or privileges are offered or furnished by the employer merely as a means of promoting the health, good will, contentment, or efficiency of his employees.

STATEMENT

The above entitled causes of action were consolidated for trial below. (R. 12.) The character of facts in both cases is identical. The appellant, Pacific American Fisheries, Inc., hereinafter referred to as the taxpayer, brought its suit below for the recovery of \$4,444.28 social security taxes for the years 1937, 1938, and 1939, while the appellant, Alaska Pacific Salmon Company, brought its suit for the recovery of \$1,790.70 social security taxes for the same years. The facts in the appeal of taxpayer Pacific American Fisheries, Inc., are typical of both and will be dealt with in this brief.

In the years 1937, 1938, and 1939, taxpayer was engaged in the business of catching and packing salmon in remote or isolated locations in southeastern Alaska, on Kodiak Island, along the Alaskan peninsula, and on Bristol Bay. The canneries in which the

packing was done were operated only during the fishing season, covering a period of only a few weeks in the Bristol Bay area and not exceeding several months in the other districts, depending upon the run of fish in the districts in which the canneries were located. (R. 13.) During the balance of the year, the canneries were closed down and deserted, except for a watchman left in charge of each. (R. 13-14.) Taxpayer transported most of its employees working in these canneries from Seattle, Washington, or other places in the states, to its canneries in Alaska and returned them at the end of the operating season. During the operating season, it was necessary, and taxpayer agreed, that as part of its operations and in addition to cash compensation, it would furnish most of its employees with lodging and sustenance at its canneries in Alaska, there being no other facilities for such lodging and sustenance. In cases where native Alaskan workers were employed and no lodging and sustenance furnished, additional cash wages were to be paid. (R. 14.) During the years 1937, 1938, and 1939, the estimated value of the lodging and sustenance which taxpayer furnished its employees in connection with its operations in Alaska amounted to \$444,428 and the one per cent social security tax which taxpayer paid thereon, and which is involved

in this suit, amounted to \$4,444.28. (R. 14-17.) It was a judgment in this amount, plus statutory interest thereon from dates of payment, for which taxpayer unsuccessfully sued in the court below.

SUMMARY OF ARGUMENT

The provisions of Section 804 of the Social Security Act not only include as wages, cash compensation paid to employees, but embrace all other remuneration of whatever kind or nature paid for services actually rendered and which is measurable in dollars and cents. The medium in which compensation is paid is immaterial. The statute, regulations and legislative history compel this conclusion.

ARGUMENT

LODGINGS AND SUSTENANCE ARE PART OF THE REMUNERATION FOR SERVICES PERFORMED AND THEREFORE CONSTITUTE WAGES.

The term "wages" is defined by Section 811(a), *supra*, to mean all remuneration for employment, including the money value of the thing other than cash which is paid to the employee. Article 14 of Regulations 91, *supra*, interpreting Section 811(a), says the statutory term "wages" means all remuneration for employment and that the medium in which the re-

muneration is paid is immaterial. "It may be paid in cash or in something other than cash, such as goods, lodging, food, and clothing." Remuneration paid in such goods is clearly distinguishable from the furnishing of facilities or privileges such as entertainment, cafeterias, restaurants, medical services, and so-called courtesy discounts on purchases furnished by an employer to his employees generally. These latter are not considered as remuneration for services, if such facilities or privileges are furnished by the employer as a means of promoting the health, good will, contentment, or efficiency of his employees. These provisions in respect to food, entertainment, and health facilities have no application whatever to such items as board and lodging. Such construction is borne out by the understanding which Congress had when considering the enactment of the Social Security Act. In H. Rep. No. 615, 74th Cong., 1st Sess., it is stated at page 32 that "Wages include not only the cash payments made to the employee for work done, but also compensation for services in any other form, such as room, board, etc."

It is to be noted that the facilities or privileges described in that portion of Article 14 in respect to food, medical services, entertainment and other facilities, are not substantial in character and value. On

the contrary, the estimated value of the lodging and sustenance furnished here is quite substantial. For instance, on the October 30, 1937, return filed with the Collector covering its 1937 operations, taxpayer reported paying \$748,725.11 in cash for wages, and \$140,954.50 to the same employees as the estimated value of lodging and sustenance furnished them in Alaska during the season. (R. 14-15.) Thus, of the total compensation paid the employees for personal services, lodging and sustenance constituted a large percentage thereof; and such remuneration is certainly not to be compared with the inconsequential value of entertainment, restaurants, medical and other facilities referred to in the regulations as not constituting wages to which the social security taxes apply. It would be stretching the ordinary meaning of simple words to say that the board and lodging furnished here constituted mere facilities or privileges furnished by the employer as a means of promoting the health, good will, contentment and efficiency of its employees.

On page 14 of taxpayer's brief, an office decision of the Commissioner of Internal Revenue (O.D. 814, 4 Cum. Bull. 84 (1921)), is quoted, which held that employees engaged in fishing and canning, who were furnished with lodging and sustenance by the employer, were not required to report the value of such

lodging and sustenance as their *income*, when it was furnished by the employer for his own convenience. It will be noted that this was an office decision promulgated fourteen years prior to the passage of the Social Security Act in 1935. But an office decision does not carry the dignity and weight of a Treasury decision in interpreting the income tax provisions of the Revenue Acts, and does not commit the Department to any interpretation of the law. *Helvering v. N. Y. Trust Co.*, 292 U.S. 455.

It does not follow that the meaning of lodging and sustenance used in connection with the income tax liability of an employee is identical with the social security tax liability of the employer who furnishes such lodging and sustenance as a part of the remuneration for services performed. The income tax of the revenue laws is levied to defray the general expenses of Government and provide for the general welfare, while the Social Security Act was enacted specifically for the benefit of the payees of wages. It was adopted to provide for old age security, unemployment insurance, security for children, and various public health services. H. Rep. No. 615, 74th Cong., 1st Sess., pp. 3-5; S. Rep. No. 628, 74th Cong., 1st Sess., pp. 4-22. The divergent purposes of the income tax acts and the Social Security Act are obvious, and it would seem to follow that what might not constitute

taxable income under the income tax provisions of the Revenue Acts may easily fall within the category of wages under the provisions of the Social Security Act. Thus, "it is not necessarily true that income means the same thing in the Constitution and the act. A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." Mr. Justice Holmes for the Court in *Towne v. Eisner*, 245 U.S. 418, 425.

S. S. T. 383, 1940-1 Cum. Bull. 201, cited on page 18 of the taxpayer's brief, held that the amounts paid by a baseball club for transportation, room, and board of its players while in training away from home and prior to the beginning of the regular season, did not constitute "wages" within the meaning of the Social Security Act. In the same bulletin in which the above ruling was cited by the taxpayer, there appears on page 211, S. S. T. 386, a ruling with respect to a situation much more closely analogous to the instant case. There, the value of board and lodging furnished to the officers and members of the crews of vessels operated by a steamship company for services performed constituted wages within the meaning of the Social Security Act. Also in S. S. T. 321, 1938-2 Cum. Bull. 323, it was held that the value of

board and lodging furnished to employees by taxpayer at its isolated sanatorium in the mountains constituted wages on which social security taxes were payable under Article 14 of Regulations 91. In this case, like the case at bar, the value of the board and room constituted a substantial portion of the total remuneration received from services performed.

These varied rulings are based on factual distinctions which it is idle to attempt to reconcile. If they be thought inconsistent, some of them must be erroneous. If so, taxpayer is not entitled to a perpetuation of the error. The only question here is whether taxpayer is entitled to be excepted from the plain language of the law. Taxpayer must find a basis in the law for such an exception and it is profitless to explore the case history of other taxpayers who perhaps were not held to the rigor of the law. Moreover, in the cases upon which taxpayer relies, there was a determination that the board and lodging were furnished because necessary for the convenience of the employer. That is the common ground upon which they rest. There is no finding in this case that the maintenance of the employees was actuated by such a reason. Taxpayer was contractually bound to maintain its employees as

a part of their remuneration. (See excerpts from contracts R. 182-194.)

The three Board of Tax Appeals cases cited by taxpayer on page 20 of its brief deal with the income tax laws and are not pertinent to the case at bar. In fact, it is submitted that due to the plain wording of the statute, the unambiguous interpretation thereof by the regulations, and the statement by the Congressional committee, all plainly embracing the value of lodging and sustenance (such as involved here) within the meaning of wages, make the citation of authorities, other than the law, the regulations and the legislative history, superfluous. It is upon the plain terms of the law, the regulations and the Congressional committee reports that the United States of America relies for an affirmance of the judgment below.

CONCLUSION

It is respectfully submitted that the judgments of the court below should be affirmed.

SAMUEL O. CLARK, JR.,
Assistant Attorney General.

SEWALL KEY,
J. LOUIS MONARCH,
MILLS KITCHIN,
*Special Assistants to the
Attorney General.*

J. CHARLES DENNIS,
United States Attorney.

HARRY SAGER,
*Assistant United States
Attorney*

THOMAS R. WINTER,
*Special Assistant to
the Chief Counsel*

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

PACIFIC AMERICAN FISHERIES, INC., a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA, *Appellee.*

—and—

ALASKA PACIFIC SALMON COMPANY, a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA, *Appellee.*

UPON APPEALS FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT OF
WASHINGTON. NORTHERN DIVISION
HON. JOHN C. BOWEN, *U. S. District Judge*

REPLY BRIEF

KERR, MCCORD & CAREY

STEPHEN V. CAREY

*Attorneys for Appellants,
Pacific American Fisheries,
Inc., a corporation, and
Alaska Pacific Salmon Com-
pany, a corporation.*

1309 Hoge Building,
Seattle, Washington.

JUL 27 1943

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

PACIFIC AMERICAN FISHERIES, INC., a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA, *Appellee.*

—and—

ALASKA PACIFIC SALMON COMPANY, a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA, *Appellee.*

UPON APPEALS FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT OF
WASHINGTON. NORTHERN DIVISION
HON. JOHN C. BOWEN, *U. S. District Judge*

REPLY BRIEF

KERR, MCCORD & CAREY

STEPHEN V. CAREY

*Attorneys for Appellants,
Pacific American Fisheries,
Inc., a corporation, and
Alaska Pacific Salmon Com-
pany, a corporation.*

1309 Hoge Building,
Seattle, Washington.

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

PACIFIC AMERICAN FISHERIES, INC., a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

—and—

ALASKA PACIFIC SALMON COMPANY, a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 10395

UPON APPEALS FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT OF
WASHINGTON. NORTHERN DIVISION

HON. JOHN C. BOWEN, *U. S. District Judge*

REPLY BRIEF

The controlling facts are not in dispute. The question is as to the application of the statute to admitted facts. Article 14 of Treasury Regulation 91 (quoted in the Government Brief, pages 4-5) sheds little, if any, light on the question, for the definition of "wages" as contained in the Regulation is merely a repetition of the same definition as it appears in the statute. The explanatory paragraphs favor the appel-

lants rather than the Government. When the paragraph of the cited Regulation (appearing at the top of page 5 of the Government Brief) is applied to the admitted facts, it reads:

“* * * Privileges (the privilege of eating in the cannery mess house and sleeping in the cannery bunk house) furnished * * * by an employer * * * are not considered as remuneration for services if * * * furnished by the employer merely as a means of promoting * * * efficiency of his employees.”

That is exactly the reason why board and lodging is furnished by the cannery operator—to promote the efficiency of the operation. On page 12 of the Government Brief in attempting to distinguish the rulings cited in our Opening Brief, it is said:

“Moreover, in the cases upon which the taxpayer relies, there was a determination that the board and lodging were furnished because necessary for the convenience of the employer. * * * There is no finding in this case that the maintenance of the employees was actuated for such a reason.”

True, the trial court refused to make that finding, but it should have done so for such is the undisputed evidence upon which we base our second specification of error (Opening Brief, page 12) reading:

“The trial court erred in failing to find that board and lodging furnished by Pacific American Fisheries, Inc., to its employees in Alaska during the operating seasons were furnished for the convenience of the employer, and the value thereof, therefore, was not taxable as wages to its employees.”

The question at issue cannot be solved as suggested in the Government Brief at page 9 by comparing the cash wages paid with the estimated value of board and sustenance furnished, and asserting that the latter amount is "quite substantial" when compared with the former. Neither the statute nor the regulations fixes such standard and who is to determine when one factor is quite substantial or ceases to be quite substantial as compared with the other.

In cases cited in our Opening Brief, page 20, the value of the quarters and meals furnished the matron at the Sanitorium was quite substantial; the value of the living furnished the hotel manager was quite substantial; and the value of the quarters furnished the army officer was quite substantial. It is fair to assume that the cost of maintaining a professional baseball player in Florida is quite substantial as compared with the cost of feeding a fisherman in Alaska. Nevertheless, the value of the maintenance of the baseball player is not "income" or "wages" within the meaning of either the income tax laws or the Social Security Act.

Much more significant than the Treasury Regulations cited in the Government Brief is the definition of wages as contained in the "Fair Labor Standards Act of 1938," in Section 3 of which, the term "wage" for the purposes of that Act is defined as follows:

" 'Wage' paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily fur-

nished by such employer to his employees." (52 Statutes 1060 Section 3-M, page 1061)

If Congress in passing the Social Security Act in 1935 had intended wages to have a different meaning than in the earlier income tax statutes, it must be assumed that provision to that effect would have been made as was done later in passing the "Fair Labor Standards Act of 1938."

On page 12 of the Government Brief referring to the various rulings of the Department it is said:

"These varied rulings are based on factual distinctions which it is idle to attempt to reconcile. If they be thought inconsistent some of them must be erroneous. If so, taxpayer is not entitled to a perpetuation of the error."

The court is not advised which ruling is thought to be erroneous, and while it may be true that a taxpayer is not entitled to a perpetuation of the error, it is equally true that the Department is not entitled to a perpetuation of the confusion.

Respectfully submitted,

KERR, MCCORD & CAREY

STEPHEN V. CAREY

*Attorneys for Appellants,
Pacific American Fisheries,
Inc., a corporation, and
Alaska Pacific Salmon Com-
pany, a corporation.*

TERMS OF COURT

NORTHERN DIVISION
SEATTLE:
FIRST TUESDAYS MAY AND NOVEMBER
BELLINGHAM:
FIRST TUESDAYS APRIL AND OCTOBER
SOUTHERN DIVISION
TACOMA:
FIRST TUESDAYS FEBRUARY AND JULY

DEPARTMENT OF JUSTICE

UNITED STATES ATTORNEY

WESTERN DISTRICT OF WASHINGTON
Seattle 4, Washington
September 17th, 1943

ST
9/16

Mr. Paul O'Brien
Clerk, Circuit Court of Appeals
Ninth Circuit
Seattle, Washington

Re: Pacific American Fisheries, Inc., Appellant,
v. United States, Appellee, and Alaska
Pacific Salmon Co., Appellant, v. United
States, Appellee - No. 10395

Dear Sir:

As the attorney of record in the above entitled case, I respectfully request that you call to the attention of the members of the Circuit Court of Appeals, Ninth Circuit, the case of

California Employment Commission v. Black-
Foxe Military Institute, 110 Pacific 2d,
729.

I believe that the above-cited case will be helpful to the Court in its consideration of the problem posed in the above matter.

A copy of this letter is being sent to counsel for the appellants, Kerry, McCord and Carey, 1309 Hoge Building, Seattle, Washington.

Very truly yours,

J. CHARLES DENNIS
United States Attorney

MK:gh

FOR DEFENSE



